

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



*B*  
**76-1293**  
*P/S*

United States Court of Appeals  
FOR THE SECOND CIRCUIT

Docket No. 76-1298

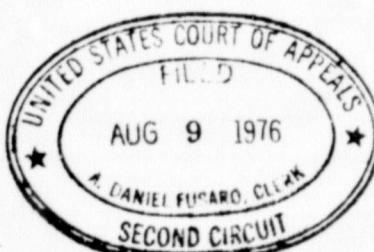
UNITED STATES OF AMERICA,  
*Appellant,*

—v.—

VINCENT ANTHONY MAGDA,  
*Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**APPELLANT'S APPENDIX**

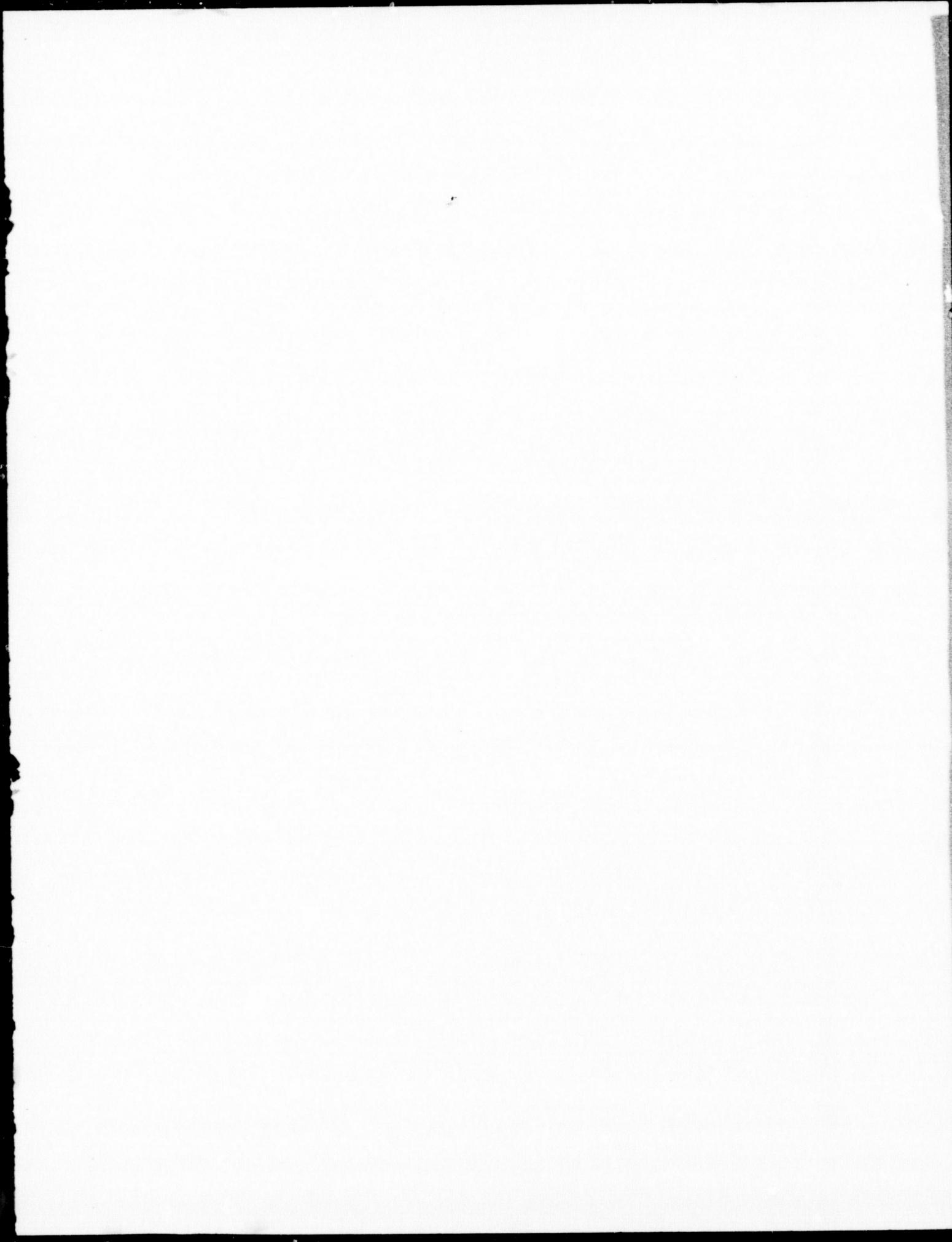


ROBERT B. FISKE, JR.,  
United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.

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CRIMINAL DOCKET  
UNITED STATES DISTRICT COURT

JUDGE CARTER

75 CRIM. 942

A 1

P. C. Form No. 100 Rev.

**TITLE OF CASE**

## ATTORNEYS

THE UNITED STATES

270

For U. S.:

EDWARD ANTHONY MAGDA

For Defendant: Legal Aid  
5 Park Row, 10th Floor  
NYC 10038 577-3409  
John P. Curley, Esq.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed	Marshal				
Violation	Docket fee				
Title 8					
Sec. 2111(a)&(d)					
Assault of ins. bank by force & violence (Ct.1)					
Assault of assault (Ct.2)					

Sec. 2111(a)&(d)  
robbery of ins. bank by force & violence(Ct.1)  
means of assault(Ct.2)

( Two Counts )

## PROCEEDINGS

DATE

9-30-75 Deft. pres. (atty. present) pleads not guilty. Bail continued at \$5,000 cash or surety. Case assigned to Carter, J. for all purposes.  
DUFFY, J.

1-2-75 Filed remand dated Sept. 30, 1975.

On 10/10/2011 filed appearance bond in the amt. of \$5,000 (receipt #58799)

8-31-75 Pre trial conference held before Carter, J.

11-97-25 Filed deft's' affidvt. and notice of motion to suppress. ret. on date to be fixed by court.

1-07-75 Filed government's affdvt. and notice of motion for an order directing deft. to furnish handwriting exemplars etc. ret. on dated to be fixed by the court.

(continued on page 2)

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PAGE 2

DATE	PROCEEDINGS
11-07-75	Filed government's memorandum of law in support of the motion for handwriting exemplars.
11-14-75	Filed deft's. affdt. of John P. Curley in opposition to motion to obtain exemplars.
11-14-75	Filed memo end. on govts. motion dated Nov. 7, 1975 for deft. to furnish handwriting exemplars---Motion granted. So ordered. Carter, J. w/a
11-14-75	Filed memo end. on deft's. motion dated Nov. 7, 1975 to suppress--Motion denied. So ordered, Carter, J. M/N
11-18-75	Filed appearance bond in the amount of \$5,000 (receipt #58799). (also see 75 CR Misc. #1.)
11-24-75	Filed papers recd. from office of Mag. Raby: docket entries; complaint; disposition sheet; and appointing counsel by the Legal Aid society of 15 Park Row, NYC 10038
11-26-75	Filed Govt's Memorandum in opposition to Deft's motion to suppress.
11-26-75	Deft's. (Atty John P. Curley) present. Suppression hearing begin & concluded. Deft's. reserved. ---CARTER, J.
11-06-76	Filed Appearance Bond in the amount of \$5,000.00 dated 11-06-76. Name of Surety: MARGARET MAGDA.
12-09-75	Filed Gov't Supplemental Memorandum in opposition to Deft's motion to suppress.
02-19-76	Deft not present. through his Atty(John P. Curley present) moves that the Bail previously fixed at \$5,000. cash/surety be exonerated and the Govt move that a Bench Warrant be ordered to be lodged as a detainer....CARTER, J.
02-19-76	Bench Warrant issued.
03-09-76	Filed OPINION #44021 = Deft moves to suppress the demand note, statements made by him after his arrest, and any other fruits of the search in which the note was found. Accordingly, the motion to suppress is GRANTED, and it is so ordered...CARTER, J. (p/b)
03-13-76	Filed Gov't Affdvt & Notice of Motion for an order permitting reargument of the Def motion to suppress and modifying this Court's decision of 3-9-76.
03-13-76	Filed Gov't Memorandum of Law in support of its motion for reargument.
3-24-76	Exhibit from the Court's proceedings dated 12-15-75.
3-29-76	Filed affdt of John P. Curley, Atty for Deft, in opposition to the motion to re-argue and modify this Court's March 9, 1976 decision and order.
3-29-76	Filed Deft's Memorandum of Law in opposition to the Gov't motion for re-argument.
4-15-76	Filed Warrant of Arrest of Deft with Marshal's return - Returned unexecuted, subsec- pled Rule 20 and is awaiting Sentence.
4-26-76	Filed Memorandum of Law in support of re-argument was dated 4-26-75

DATE

PROCEEDINGS

1-76 Filed OPINION. In sum the Govt's motion to limit the scope of the evidence subpoenaed is denied as to the fingerprint identification, & granted as to any identification testimony of witness Dasabarr. ... So ordered Carter, J. M/N

1-9-76 File Govt's notice of appeal from order of 3-9-76 (M/N to deft's atty)

1-9-76 File notice of certification of record to USCA on 7-2-76

AR8:wp

UNITED STATES: DISTRICT COURT  
SOUTHERN DIS. CT OF NEW YORK

UNITED STATES OF AMERICA

V  
VINCENT ANTHONY MAGDA,

Defendant.

INDICTMENT

75 Cr. 942

COUNT ONE

The Grand Jury charges:

On or about the 22nd day of August, 1975, in the Southern District of New York, the defendant, VINCENT ANTHONY MAGDA, unlawfully, wilfully and knowingly did, by force and violence and by intimidation, take from the person and presence of another property and money in the approximate amount of \$100.00 belonging to, and in the care, custody, control, management and possession of the United Mutual Savings Bank, 20 Union Square, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Section 2113(a).)

COUNT TWO

The Grand Jury further charges:

On or about the 22nd day of August, 1975, in the Southern District of New York, the defendant VINCENT ANTHONY MAGDA, unlawfully, wilfully and knowingly did assault Thomas Holder while committing the offense described in Count One of this Indictment.

(Title 18, United States Code, Section 2113(d).)

FOREMAN

PAUL J. CURRAN  
United States Attorney

1 js

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

----- x

4 UNITED STATES OF AMERICA :  
5

6 vs. :  
7

8 VINCENT ANTHONY MAGDA, : 75 CR. 942 (RLC)  
9

10 Defendant : Suppression Hearing  
11 ----- x  
12

13 Before:  
14

Hon. Robert L. Carter,

15 District Judge  
16

17 New York, N. Y.  
18

19 November 26, 1975 - 3.00 P.M.  
20

21 APPEARANCES  
22

23 Thomas J. Cahill, Esq.,  
24 United States Attorney  
25 For the Government  
By: JEREMY G. EPSTEIN, ESQ.,  
Assistant United States Attorney

JOHN P. CURLEY, ESQ.,  
Attorney for Defendant

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2                    MR. EPSTEIN:    Government ready.

3                    MR. CURLEY:    Defendant ready.

4                    MR. EPSTEIN:    Your Honor, I would like to thank  
5                    you for holding this hearing today. The policeman, who is  
6                    my only witness, is planning to go to the west coast tomorrow  
7                    and he and I both appreciate your accommodating your schedule  
8                    to us.9                    Do you want any sort of summary statement of  
10                   the Government's position, your Honor? I submitted a memo-  
11                   randum this afternoon to your chambers.

12                   THE COURT:    I have seen it.

13                   MR. EPSTEIN:    Our position is, briefly, that  
14                   the police officer was justified in stopping Mr. Magda on  
15                   the basis of what he had observed at 43rd Street and Eighth  
16                   Avenue, that there was no probable cause for arrest, but  
17                   under Terry v. Ohio and Peters v. New York the officer had  
18                   sufficient reasonable suspicion to stop Mr. Magda and ask  
19                   him to give an account of himself, no more than that.20                   At the point that Mr. Magda was stopped, he  
21                   responded to a series of questions and admitting buying a  
22                   marijuana cigarette and produced the cigarette. At that  
23                   point, we submit, there was probable cause to arrest because  
24                   the officer had reasonable grounds to believe that a crime  
25                   had been committed.

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2                After the arrest, he searched Mr. Magda incident  
3                to the arrest, and it is our position that the search he did  
4                of Mr. Magda's body, which disclosed the demand note, was  
5                a search incident to a lawful arrest.

6                The threshold question, obviously, is whether  
7                there was reasonable suspicion to stop Mr. Magda, and our  
8                position is that the officer did have such reasonable grounds.

9                THE COURT: All right. Mr. Curley, do you  
10               want to tell me what your position is now or do you want to  
11               wait?

12               MR. CURLEY: Yes, your Honor.

13               I have previously submitted a motion paper  
14               requesting a hearing on the grounds that Mr. Magda's Fourth  
15               Amendment rights had been violated, and indicated that if  
16               there were not a hearing in the Criminal Court by that time,  
17               the Criminal Court of the City of New York, an evidentiary  
18               hearing before your Honor would support my contention, and  
19               I noted in my papers that although the Criminal Court case  
20               did not directly refer to the bank robbery case, that the  
21               logical sequence of events in the taint arguments would  
22               prevent the Government from introducing substantially all  
23               the evidence against the defendant in the indictment before  
24               your Honor.

25               And I noted that we are prepared to proceed in

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A        8

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2        either jurisdiction because we felt that it was the same  
3        Fourth Amendment issue that was going to be reviewed in  
4        either jurisdiction.

5                In my letter to your Honor last week, I noted  
6        that this same Fourth Amendment issue was before a criminal  
7        court judge with appropriate jurisdiction over that charge  
8        at that time, and he ruled that the New York statutes which  
9        are in contention are based upon the New York interpretation  
10       of the Supreme Court decision defining the right of the  
11       state or police authorities to impinge upon a defendant's  
12       Fourth Amendment rights, and he ruled in Mr. Magda's favor  
13       after a full hearing before him.

14               As a result of the judge's decision, the  
15        district attorney announced that the People, meaning the  
16        people of the State of New York as represented by the New  
17        York County District Attorney's office, had no evidence with  
18        which to continue with the prosecution, and accordingly they  
19        moved to dismiss the charges against Mr. Magda.

20               That motion to dismiss was granted, the case is  
21        over, and obviously, by doing so, the New York County Dis-  
22        trict Attorney's office indicated their concurrence with  
23        the judge's ruling, since they do have a right to appeal  
24        the termination of a criminal case by a judge's order.

25               THE COURT: What was the pending charge?

2                    MR. CURLEY: The pending charge was possession  
3                    of a marijuana cigarette and possession of an unloaded  
4                    firearm, revolver.

5                    THE COURT: All right.

6                    MR. CURLEY: And I initially advised Mr.  
7                    Epstein that the record may not have been complete -- I now  
8                    have a copy of those proceedings -- but that the ruling  
9                    on the Fourth Amendment issue made by a judge with competent  
10                   authority decided the issue in this case; that the police  
11                   officer, who is the Government's witness in this hearing,  
12                   was before the Court and he testified concerning the facts  
13                   in question.

14                   THE COURT: That is an interesting proposition.  
15                   I think you are going to have to explore that further in  
16                   some written form, because my initial reaction would be that  
17                   that is not the case since that decision was made in connec-  
18                   tion with a matter over there.

19                   But I think that on this charge I don't believe  
20                   that I am bound by any decision that has been made in the  
21                   state courts on that particular issue and upon the evidence.  
22                   I think it is a question of fact, and the question is going  
23                   to be one of fact and one of testimony.

24                   It would seem to me that I would have to con-  
25                   sider this de novo. But certainly, Mr. Curley, if you have

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2       some case law that reaches a contrary conclusion, I certainly  
3       am going to consider it.

4                    MR. CURLEY: Yes, your Honor. I am requesting  
5       just to preserve that issue and to have the hearing that Mr.  
6       Epstein has consented to and requested, and requesting an  
7       adjournment to submit argument on the issue of the probable  
8       cause as well as the effect of the judge's ruling in the  
9       criminal court.

10                  THE COURT: Did the judge over there file a  
11       written opinion or merely announce it from the bench?

12                  MR. CURLEY: No, your Honor; from the bench.

13                  THE COURT: Then I would like to see a transcript  
14       of that.

15                  MR. CURLEY: I have that, your Honor, and I will  
16       provide it as soon as I can photostat a copy for you.

17                  THE COURT: Fine.

18                  MR. CURLEY: He relied upon a case which I will  
19       refer to at the end of this matter, People v. Cantor. It  
20       is misspelled in the transcript. And I've also photostated  
21       that decision. It is an advance sheet.

22                  THE COURT: All right. You may proceed.

23                  MR. EPSTEIN: The Government calls Saverio  
24       Alesi.

2 S A V E R I O A L E S I, called as a witness by  
3 the Government, being first duly sworn, testified  
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. EPSTEIN:

7 Q Mr. Alesi, how are you employed?

8 A Police officer, New York City Police Department.

9 Q And how long have you been a police officer?

10 A little over eleven years.

11 Q And what is your assignment at present?

12 A I am a foot patrolman assigned to the Midtown South  
13 Precinct.

14 Q Could you describe the nature of your activities,  
15 please?

16           A    I work a 22 Squad shot on foot, patrolling the  
17           Midtown South Precinct.

18 Q What are the boundaries of the Midtown South  
19 Precinct?

20           A    29th Street to 45th Street, Ninth Avenue to  
21           Lexington Avenue.

22 Q Now, I direct your attention to September 5th,  
23 1975 at approximately 3.00 P.M. Were you on duty at that  
24 time?

2            Q    Where were you on duty?

3            A    I was assigned to foot patrol post 101, which is  
4            Eighth Avenue, 42nd Street to 45th Street.

5            Q    And when did you come on duty that day?

6            A    Eight A. M.

7            Q    And what had you been doing earlier during that  
8            day?

9            A    Patrolling my post.

10           Q    Now, what, if anything, did you observe at approxi-  
11           mately 3.00 P.M.?

12           A    At 3.00 P.M. I was standing on the southwest corner  
13           of 43rd Street and Eighth Avenue. There is a little news  
14           stand there. I observed the defendant standing on the  
15           north side of 43rd Street, about fifteen or twenty feet from  
16           the corner.

17           Q    Excuse me. That is the northwest or the northeast  
18           corner?

19           A    That would be the northwest corner.

20           Q    Continue, please.

21           A    The defendant was facing westbound on 43rd Street  
22           and he was speaking to a male black who was facing east on  
23           43rd Street.

24           Q    And how far were you from these two individuals?

25           A    Approximately thirty feet, thirty five feet.

1                   Q    And what, if anything, did you see?

2                   A    I observed the defendant and the male black  
3                   exchange something with each other. I couldn't see what  
4                   it was. They just exchanged something.

5                   Q    Could you describe the manner in which this was  
6                   done?

7                   A    Well, the defendant reached across and gave some-  
8                   thing to the man he was talking to and simultaneously took  
9                   something back. I couldn't see what it was. It took  
10                   about a second or ~~two~~ to do it.

11                   Q    Would it be fair to say that he offered something  
12                   with one hand and received something with the other?

13                   A    Yes, that's correct.

14                   Q    That both hands were engaged, is that correct?

15                   A    Yes.

16                   Q    After the exchange was completed, what, if anything,  
17                   did you see at that time?

18                   A    Well, just as they were finishing up, the male  
19                   black seen me, looked across the street and saw me just  
20                   as he was finishing. He turned to his right and walked  
21                   west on 43rd Street.

22                   MR. CURLEY: I object to the expression "saw  
23                   me" as being an operation of the witness' mind. Even though  
24                   this is a hearing, I think the general form of the question

1        jg

Alesi - direct

10

2        and response is, "He looked in my direction," and to the  
3        extent that this was a conclusion I object to it and move  
4        to strike it.

5                    THE COURT: All right. I think that's right.

6                    Q Yes. Proceed, sir.

7                    A He looked in my direction and turned around and  
8        proceeded to walk westbound on 43rd Street.

9                    Q And what, if anything, did you see Mr. Magda do?

10                  A He turned to his left and proceeded to walk across  
11        43rd Street in a southbound direction on Eighth Avenue,  
12        which brought him in front of me.

13                  Q And what happened at that time?

14                  A As he walked by me, I asked him to stop a minute.  
15        I said I wanted to speak with him.

16                  Q And what happened then?

17                  A He turned around. He kept walking, but he slowed  
18        down and he turned around, and I started to ask him some-  
19        thing.

20                  Q And could you tell us that conversation, please?

21                  A I asked him what had gone on across the street,  
22        and he said to me, "No, nothing. Why?" And I said, "I  
23        seen you do something with this black guy across the street,  
24        exchange something, you know. What was it?"

25                  And then at the time he said to me, "All right.

1 || 19

Alesi - direct

11

I bought a mar--" --

3 MR. CURLEY: I didn't hear the witness.

4           A (Continuing) He said, "All right. I bought a  
5           marijuana cigarette for a dollar," and at the same time  
6           produced it out of his inside coat pocket and showed it to  
7           me.

8      Q    What happened at that point?

9       A    I placed him under arrest for having contraband  
10      and told him of his rights and started to walk back towards  
11      43rd Street, looking for the male black who had left.  But  
12      I didn't see him.

Q And what did you do after that?

14       A     I called for assistance on my portable radio, to  
15           have a radio car come and assist me.    And just as I got  
16           to 43rd Street and the northwest corner there, there is a  
17           bank there, when I got to the corner, the radio car came  
18           and two officers got out of the car and I put the defendant  
19           against the wall, spread his legs and proceeded to search  
20           him.

21 Q And what, if anything, did you find in the s  
e  
r  
v  
i  
c  
e  
s  
?

22           A   Up in his right inside coat pocket I found a 9 mm.  
23           Browning automatic revolver.

24 Q And what, if anything, else?

25 A And there was a note in the pocket also.

1      jg

2      Q      I show you what has previously been marked  
3      Government Exhibit 1 and I ask if you can identify that.

4      A      Yes.    This was in his pocket, right.    It was in  
5      an envelope in his pocket.

6      Q      That is the note that you removed from his pocket?

7      A      Yes.

8              MR. EPSTEIN:    Your Honor, I offer the note.

9              MR. CURLEY:    No objection.

10             THE COURT:    I didn't hear you.

11             MR. EPSTEIN:    I offer the note for the purpose  
12             of this hearing.    I'm sorry.

xxx

13             (Government Exhibit 1 for identification  
14             was received in evidence.)

15             Q      Officer Alesi, could you describe in greater  
16             detail the manner in which you located the gun and the note?

17             A      I took the defendant and placed his hands on the  
18             wall of the bank and I spread him approximately four to  
19             five feet away from the wall.    His feet maybe were two to  
20             three feet apart.

21             I started to pat him down around his ankles  
22             and worked up his legs to his torso.    When I got up in this  
23             area, of his chest, that's when I felt it.    At the time it  
24             just come out as an object.    I didn't know what it was.  
25             It was just hard.

1 jg

2 Q And after you felt something, what did you do?

3 A I went inside of his coat pocket and I removed the  
4 gun. But, as I went inside, I felt something else in there.  
5 You know, I didn't know what it was at the time, but I took  
6 the gun out first, gave the gun to one of the other officers,  
7 went back into the pocket and removed the note, what turned  
8 out to be the note.

9 Q Was the note in anything at the time?

10 A It was in an envelope.

11 Q Now, what happened after you discovered the note?

12 A I handcuffed the defendant, we placed him in the  
13 radio car, and I took him to the Midtown South Precinct for  
14 the arrest procedure.

15 Q Officer Alesi, how long have you been a foot  
16 patrolman?

17 A I was for three years when I first came on the  
18 police force, in Brooklyn, I spent almost eight years as a  
19 motorcycle policeman, and I spent the last six months on  
20 foot patrol in the Midtown South area.

21 Q And have you made other arrests on the street?

22 A Yes, I have.

23 Q Have you made other arrests for narcotics on the  
24 street?

25 A Yes, I have.

1 gg

2 Q Have you seen arrests made on the street for  
3 narcotics?

4 A Yes.

5 Q By other officers?

6 A Yes.

7 Q Have you seen arrests made in the 43rd Street  
8 area for narcotics?

9 A Yes.

10 Q Could you describe to us the extent of your know-  
11 ledge concerning narcotics activities in the 43rd Street  
12 area?

13 A We have a "Special Attention Locations" in our  
14 precinct, in our muster room, of narcotics prone locations,  
15 prostitution locations, robbery locations, in forms of maps  
16 and graphs. On 43rd Street, between Eighth and Ninth, in  
17 the middle of the block, there is a park called McCaffrey  
18 Park. That usually has like twenty four hour attention.  
19 And on the block 43rd Street, Eighth and Ninth, a policeman  
20 is assigned, and it is a narcotics prone location, according  
21 to our charts.

22 Q And it is so indicated on your maps?

23 A Yes.

24 Q How far is McCaffrey Park from the area you saw  
25 Mr. Magda receive the cigarette?

A 19

18  
Alesi - direct

15

1      jg

2 A Approximately a hundred feet west of where he was.

5           A   Just about; a little off center, more west, about  
6        100 or 125 feet west of where he was standing.

7 MR. EPSTEIN: Fine. I have nothing further,  
8 your Honor.

9 MR. CURLEY: May I have a moment to examine a  
10 document that hasn't been identified, your Honor?

11 THE COURT: Yes.

12 (Pause)

13 CROSS EXAMINATION

14 BY MR. CURLEY:

15 Q Patrolman Alesi, concerning this incident about  
16 which you've been testifying, you say that McCaffrey Park is  
17 about 120 or 125 feet from the corner? .

18 A. No. From where the defendant was, I said.

19 Q Well, you saw the defendant at the corner?

20 A No. A little off the corner, west of the  
21 corner.

22 Q How far off the corner?

23 A 15. 20 feet.

24 Q And this was the corner on which you had been  
25 standing continuously?

1 jg

2 A No. I was standing there at that time. I wasn't  
3 there continuously, though.

4 Q During the time to which you testified on direct  
5 examination.

6 A I was standing on the corner when I noticed the  
7 defendant. Yes, I was stationary, on the southwest corner  
8 of 43rd Street.

9 Q And he came in your direction?

10 A He crossed the street in my direction.

11 Q So that's where you were during this period of  
12 time, the southwest corner of 43rd Street and Eighth Avenue.

13 A Right.

14 Q And in which direction was he moving at the time  
15 that you stopped him?

16 A He was walking north to south on Eighth Avenue,  
17 on the west side of Eighth Avenue.

18 Q So he was walking south toward downtown, correct?

19 A Right.

20 Q And McCaffrey Park is west, correct?

21 A McCaffrey Park is on 43rd Street between Eighth  
22 and Ninth Avenues, on the north side of the street, approxi-  
23 mately half way up the block.

24 Q So it is west of where you were.

25 A Yes.

2            Q    The park is to the left, and he was moving south.

3            A    Right.

4            Q    And you say that park is located midway between  
5    Eighth Avenue and Ninth Avenue.

6            A    No.   Approximately.   It starts, say, midway and  
7    it goes towards Ninth.   So I would say three quarters of  
8    the block, way up the block.   It would be closer to Ninth  
9    than Eighth Avenue.

10          Q    So would you still say, then, that the closest part  
11    of McCaffrey Park was approximately 120, 125 feet from  
12    Eighth Avenue?

13          A    No.   I didn't say that.

14          Q    Where is McCaffrey Park, the closest point from  
15    where you were, from where you were standing?

16          A    From where I was I would say probably about 150  
17    to 160 feet from where I was standing.

18          Q    And the defendant was closer to the park?

19          A    Yes.

20          Q    And yet he was walking not on 43rd but on Eighth  
21    Avenue?

22          A    The defendant was on 43rd Street when I first  
23    observed him.

24          Q    And he was walking south?

25          A    He turned to walk south, across 43rd Street, on a

2 bit of an angle, because he was about fifteen feet from  
3 the corner. He wasn't right on the corner.

4 Q So you are talking about a short distance, part  
5 of the length of the sidewalk that made him closer to the  
6 park than you were?

7 A He was standing on the north side of the street.

8 McCaffrey Park is on the north side of the street. But he  
9 was on the north side of the street and he was a bit up,  
10 west on 43rd Street. I was right on the corner, right on  
11 the southwest corner, approximately five feet off of Eighth  
12 Avenue.

13 THE COURT: What is your testimony? When you  
14 first saw him, he was on 43rd Street?

15 THE WITNESS: Yes, sir.

## 16 THE COURT: Towards Ninth Avenue?

17 THE WITNESS: Approximately fifteen, twenty  
18 feet off of Eighth, towards Ninth, right.

19 THE COURT: And then, when he walked south  
20 towards Eighth, across the street towards Eighth, he was  
21 walking towards you?

22 THE WITNESS: Right.

23 BY MR. CURLEY:

Q About your testimony concerning the patrolman in  
McCaffrey Park, were you assigned to watch McCaffrey Park

2      specifically at that time?

3            A    No.

4            Q    Would it be fair to say that even if it were only  
5      100 or 125 feet, you wouldn't be able to see anything from  
6      where you were on 43rd Street and Eighth?

7            A    I wouldn't be able to see anything?

8            Q    Yes.

9            A    No.    I could see the news stand.    I could see.  
10          I don't understand the question.

11          Q    My question was directed to McCaffrey Park.

12          A    No, I couldn't see in the park from where I was.  
13          No, I couldn't.

14          Q    You've testified on two prior occasions concerning  
15      this incident in the New York City Criminal Court, have you  
16      not?

17          A    Yes.

18          Q    Did you ever previously say that you saw both hands  
19      of Mr. Magda and the black man extended, giving or receiving  
20      something at the same time?

21          A    I don't recall if I testified to that the last  
22      time, but that's what I saw.

23          Q    Was Mr. Magda giving something with his right hand  
24      or receiving something with his right hand, if you can  
25      recall?

2      A    No, I can't recall if he gave or received.

3      Q    Was the black man extending -- giving or receiving  
4      something with his right hand, if you can recall?

5      A    I couldn't tell. I couldn't see what was in  
6      their hands. So I don't know if it was to take or to give.

7      Q    Did you ever see anything in either of these two  
8      men's hands, that is, Mr. Magda, the man you arrested, and  
9      the unknown black male?

10     A    No.

11     Q    You were in uniform on that day?

12     A    Yes.

13     Q    Which means you also had a weapon on you, exposed,  
14     outside of your uniform?

15     A    Yes.

16

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1 mbl Alesi - cross

2 Q Can you describe the exchange of hands that you  
3 mentioned on your direct testimony a short while ago?

4 A Simultaneously, they went across to each other,  
5 left hand to right, right hand to left, put it back to  
6 their side.

7 Q Were they each holding each other's hands at the  
8 same time?

9 A They didn't hold hands, you know, they just went  
10 up and exchanged something.

11 Q Did you see any contact between the men's hands  
12 at any time?

13 A No, I seen contact, yes, but --

14 Q Would you describe the contact that you saw?

15 A I really can't describe it. They just went  
16 like this (indicating), came away.

17 Q Would you do that slower so we can make a record  
18 concerning what you are indicating with your hands?

19 A I seen them come, touch hands, and take their hands  
20 apart ( indicating ).

21 Q You are indicating left hands and right hands  
22 at the same time?

23 A Simultaneously, yes. I don't know if they went  
24 right hand to right hand or left hand to left hand.

25 Q And is 43rd Street and Eighth Avenue a fairly busy

1 mb2

A 26  
Alesi - cross

2 intersection about three o'clock in the afternoon?

3 A Yes.

4 Q Were there a lot of people there on that particular  
5 day to your recollection?6 A Just the moderate flow of people. It's heavy, but  
7 moderate at the time?

8 Q Heavy but moderate?

9 A Yes, nothing out of the ordinary for that.

10 Q What would you say is the ordinary traffic on  
11 43rd Street and Eighth Avenue at three o'clock in the  
12 afternoon?

13 A Moderate pedestrian traffic.

14 Q How about vehicular traffic?

15 A Moderate vehicular traffic.

16 Q Is that a main artery going uptown, Eighth Avenue?

17 A Yes.

18 Q And 43rd Street is a crosstown one-way street?

19 A Yes.

20 Q And to your knowledge, is that an area also frequen-  
21 ted by undercover police officers, that is, police officers  
22 who are not in uniform?

23 A To my knowledge, I don't know. I don't know.

24 Q You mentioned prostitution earlier on your  
25 direct testimony. Are there plainclothes patrolmen assigned

1 mb3 Alesi - cross

2 to that type of police activity?

3 A. We have a thing called Prostitution Control Unit  
4 in our precinct, which I have nothing to do with, and know  
5 very little about.6 Q. Do you know whether or not people assigned  
7 to that unit or similar units work in plainclothes as  
8 opposed to uniforms in that area?9 A. I don't know. I don't know if they work in  
10 plainclothes. I don't know.11 Q. To your knowledge, is that an area where police  
12 officers, including police women, have conversations  
13 with pedestrians which lead to arrests for violations  
14 of the vice laws or the prostitution laws, the soliciting  
15 laws of New York State?

16 A. Uniformed police officers?

17 Q. No.

18 A. I see a lot -- it's well covered by uniformed  
19 police officers, that area.20 Q. Are you aware that that is the neighborhood in which  
21 police women arrest men for soliciting them for the purposes  
22 of prostitution.

23 A. No.

24 Q. You are not aware of that?

25 A. No.

1 mb4

Alesi - cross

2 Q. Are you aware of that situation in which men are  
3 arrested for soliciting --

4 MR. EPSTEIN: I object to the relevance.

5 MR. CURLEY: This goes to the credibility of the  
6 witness, your Honor. I think the Government has tried to  
7 qualify him as an expert in activity in that location.

8 THE COURT: All right.

9 Q. Are you aware of the situation in which police  
10 officers speak to pedestrians in that area concerning  
11 attempts by pedestrians to solicit people for acts of  
12 sexual conduct prohibited by the New York laws?

13 A. Are you talking about public morals?

14 Q. Yes, public morals.

15 A. I know nothing about public morals. I am with the  
16 uniformed patrol force so --

17 Q. I understand that.

18 A. Yes.

19 Q. I am talking about in your responsibility, with  
20 your police training with the Academy, your reading of New  
21 York newspapers, listening to the radio, television, etc.,  
22 are you aware of the fact that police officers make arrests  
23 in that area for violations of the public morals laws?

24 A. Yes.

25 Q. And to your knowledge do those policemen and women

A 29  
Alesi - cross

1 mb5  
2 arrest for solicitation while the police officers are in  
3 police uniform? I am talking about direct solicitation,  
4 not observations.

5 A I don't understand the question.

6 Q Have you ever heard of a prostitute or a pimp  
7 soliciting a uniformed policeman concerning a violation of  
8 the public morals laws that you have mentioned?

9 A No.

10 Q I will repeat my question, Patrolman Alesi: Isn't  
11 it a fact that that particular area, the Times Square area  
12 including 43rd Street and Eighth Avenue, is an area in which  
13 plainclothes or undercover policemen and women are on duty  
14 in reference to their assignments concerning such solicitations  
15 concerning the public morals laws?

16 A Yes.

17 Q And when you say you have witnessed arrests in that  
18 area, do they include arrests for such laws or violations of  
19 such laws?

20 A Yes.

21 Q In other words, you have seen some of the women  
22 there in the high boots and the short skirts and the wigs  
23 and matters like that; is that correct?

24 A Yes.

25 Q That is part of your beat, 43rd Street and Eighth Avenue

2 A. Yes.

3 Q. Were you equipped with any radio equipment on  
4 that day?

5 A. Yes.

6 Q. Are you assigned a partner or a backup unit while  
7 you were on such patrol?

8 A. No.

9 Q. Did you make any communication by radio concerning  
10 the activity that you had seen while you were on the  
11 corner across the street from Mr. Magda and the black man  
12 making your observations?

13 A. No.

14 Q. Did you at any time make any communication or  
15 direction to any police officer to apprehend the black man  
16 who had walked in the opposite direction?

17 A. No.

18 Q. Where were you when the defendant, Mr. Magda,  
19 crossed the street from the northwest corner to the  
20 southwest corner?

21 A. I was on the southwest corner.

22 Q. Were you in a doorway? Were you standing directly  
23 on the corner?

24 A. There is a newsstand on that corner, and I was  
25 standing -- it faces east, and I had my back to it.

1 mb7

Alesi - cross

2 Q And so when he came across that street, which you  
3 have described as a distance of about thirty, thirty-five  
4 feet, he was walking in your direction?

5 A Yes.

6 Q And facing in your direction?

7 A Yes.

8 Q When he walked by you, did you make any physical  
9 contact with him?

10 A I think I tapped him as he walked by me. I think  
11 I tapped him on the shoulder, and I asked to speak to him  
12 a minute.

13 Q Is there any doubt in your mind as you testify this  
14 afternoon that you made physical contact with him when he  
15 came by you?

16 A There is no doubt. I think that's what I did. I don't  
17 know. I don't recall. I didn't use no force. I just tapped  
18 him. I think on his right shoulder I tapped him at that time.

19 Q He was coming in your direction, wasn't he?

20 A He walked by me.

21 Q He walked by you. In other words, he had passed you?

22 A Yes, right, he had walked by me two or three feet.

23 Q And then you reached out and put your hand on  
24 his shoulder; is that what you are indicating?

25 A Yes, I started to walk with him.

1 mb8 Alesi - cross

2 Q And you told him to stop?

3 A Yes, I think I asked him to stop, I wanted to  
4 talk with him, yes.

5 Q What did you say to him exactly?

6 A I don't know exactly. I don't recall exactly what  
7 I said.

8 Q In substance, what did you say to him or to the best  
9 of your recollection?

10 A I asked if I could speak with him.

11 Q Did you say what you wanted to speak to him about?

12 A When I said that to him, he turned around, and he  
13 said, "Why?" You know, something to that effect.

14 Q And what was happening while you were having that  
15 conversation? In other words, was Mr. Magda stopped, were  
16 you walking along with him, had you pulled him off  
17 to the side? What was happening in terms of the physical  
18 motion of you and Mr. Magda at that point?

19 A I was walking along with him. He had turned around to  
20 me, and he was like walking backward at a slow pace, and I  
21 was walking kind of abreast of him.

22 Q He was walking backwards towards you?

23 A No, he was walking backwards away from me.

24 Q As I recall your testimony, Patrolman, he  
25 walked by you?

1 mb9

Alesi - cross

2 A. Right.

3 Q. He was coming from the northwest side to the  
4 southwest side?

5 A. Right.

6 Q. When he passed you, were you facing, I believe you  
7 said, you were facing him?

8 A. Yes.

9 Q. And he continued going south on Eighth Avenue?

10 A. Right.

11 Q. And you put your hand on his shoulder and told him  
12 you wanted him to stop, you wanted to talk to him; is  
13 that right?14 A. Yes, I -- I didn't -- see, I tapped him. I didn't  
15 grab him to stop him. He voluntarily slowed down.

16 MR. CURLEY: Move to strike that, your Honor.

17 Q. Just tell us what you did.

18 A. That's what happened. He voluntarily stopped,  
19 turned around, and spoke to me.

20 Q. My question was, he was going south past you?

21 A. Right.

22 Q. Did you turn around to follow him?

23 A. I made a right turn to walk with him, right.

24 Q. And did you walk with him?

25 A. About three or four steps.

1 mb10 Alesi - cross

2 Q. And then I think where I interrupted you, you said  
3 something about his walking backwards towards you?

4 A. No, not towards me. He didn't walk backward towards  
5 me. He turned and he faced me, which brought him around  
6 facing north walking backwards south. I was walking south  
7 facing south with him for a couple of steps.

8 Q. Would you describe the distance between the two of  
9 you when he turned around and came back, walked backwards  
10 towards you?

11 THE COURT: That is not his testimony, Mr. Curley.  
12 His testimony is that he walked past and tapped him;  
13 they were both going south in that direction; Mr. Magda  
14 turned and kept going south so he was walking backwards,  
15 and the patrolman was walking with him. He was walking  
16 backwards south. That was his testimony.

17 MR. CURLEY: That is what I want to try and  
18 clarify, your Honor. I am not sure what that backwards  
19 south means. If I may just --

20 THE COURT: Clarify it if you will. It seems  
21 perfectly clear to me, at least from his testimony, that the  
22 man was moving backwards and he was moving forward, and  
23 they were talking, and they both were going south.

24 Isn't that what your testimony is?

25 THE WITNESS: Yes, sir.

1 mbll Alesi - cross

2 Q You were facing in opposite directions; is that  
3 your testimony?

4 A I was facing southbound.

5 THE COURT: And he was facing north.

6 THE WITNESS: And he was facing north, but he was  
7 walking south.

8 Q So he was walking away from you, he was walking  
9 south and you were walking south?

10 THE COURT: That's right.

11 A Right, right, right.

12 Q And you were facing south and he was facing  
13 north?

14 A Right.

15 Q How long a distance was covered during this time  
16 when you were going south from 43rd to 42nd and you were  
17 facing south and he was facing north?

18 A We covered maybe about eight or ten feet and  
19 then we stopped.

20 Q Did you tell him to stop?

21 A No, he just stopped. He stopped and I stopped.

22 Q Did you tell him to turn around and walk side  
23 by side with you?

24 A At that time?

25 Q Yes, at that time?

1 mbl2

Alesi - cross

2 A. No.

3 Q. You didn't. To your recollection, did this  
4 situation in which you were in uniform walking this  
5 distance and Mr. Magda was in front of you walking the same  
6 direction but facing you attract any crowd or anything?

7 A. I didn't notice that because I was facing the  
8 defendant. I didn't notice if anybody came around.

9 Q. Isn't this the high crime area that you referred  
10 to earlier?

11 A. Referred to it as a narcotics-prone location.

12 Q. Didn't we also discuss prostitution?

13 A. We discussed --

14 Q. The public morals laws in that area?

15 A. Discussed prostitution too, right.

16 Q. Is it an area that is also known for other types of  
17 criminal activity besides public morals and narcotics?

18 A. Yes.

19 Q. During this period of time in which you and he are  
20 walking south on Eighth Avenue from 43rd to 42nd, did you  
21 notice anybody else in that area?

22 A. There were other pedestrians. I couldn't --

23 Q. By pedestrians, isn't this the area where the  
24 Mayor is trying to clean up Times Square?

25 MR. EPSTEIN: Objection, your Honor.

1 mb13

Alesi - cross

2 Q. To your knowledge?

3 A. You have to ask the Mayor about that. I don't know.

4 Q. I am asking to your knowledge. You are not aware  
5 of this?

6 A. That specific street or that whole --

7 Q. That specific street.

8 A. I guess that would be included.

9 Q. I want to go over one matter with you, Patrolman

10 Alesi. When you put your hand on my client's shoulder,

11 in what direction were the two of you facing?

12 A. South.

13 Q. In other words, he had come up to you from the  
14 north side of the street and had slightly passed you, and  
15 you had turned around in reference to his movements, so that  
16 you were now both facing the same way?

17 A. Yes.

18 Q. And it is your testimony that after you had put  
19 your hand on his shoulder, that he continued to walk eight or  
20 ten feet?

21 A. He turned around.

22 Q. Yes.

23 A. And proceeded to walk backward like I described  
24 before for approximately eight or ten feet.

25 Q. Did you order him to stand still at any time?

A. No, I don't recall, no.

1 mbl4

Alesi - cross

2 Q Did you tell him to move into a doorway where  
3 you could have a private conversation with him, or anything  
4 like that?

5 A No

6 Q Is that standard police procedure, Patrolman  
7 Alesi, to take a suspect off a crowded thoroughfare and into  
8 a private place?

9 A No.

10 Q Have you in the Academy received instructions on  
11 how to conduct an investigation?

12 A It's a long time ago. Yes, I guess I did. I guess  
13 I received instructions.

14 A Isn't it a basic instruction to take a suspect out  
15 of a thoroughfare where a crowd could gather and to conduct  
16 an investigation?

17 A I do what the situation calls for at the time, and  
18 at the time there id didn't call for it. I didn't notice  
19 any crowd gathering. I didn't notice an unruly mob around  
20 us at the time, no; so I didn't take him off to the side  
21 and isolate him from anything because I didn't feel there  
22 was any immediate danger to me or to him from the crowd.

23 Q You felt you were not in any immediate danger  
24 because you had not seen or heard anything that had taken  
25 place between Mr. Magda and this unidentified male black

1 mb15 Alesi - cross

2 earlier; is that correct?

3 A I didn't see nothing, no, correct, correct.

4 Q Is it your testimony, Patrolman Alesi, that you  
5 told Mr. Magda to stop?

6 A I said I wanted to speak with him. I don't know  
7 if I said? "Stop in the name of the law," or "Halt," but  
8 I just said I wanted to talk with him, and he complied.

9 Q Did you tell him, in addition to wanting to speak  
10 to him, that you wanted him to stop or to halt?

11 A I didn't think it was necessary because I was  
12 speaking with him.

13 Q Do you remember being asked certain questions  
14 before Judge Kleiman on the 14th of November?

15 A I remember appearing in a court. I don't recall  
16 what questions were asked. I assume it was questions like  
17 you are asking me now.

18 Q Do you remember being asked this question from  
19 page 17 of that transcript, starting at the top:

20 "The Court" -- meaning the judge -- "The statement  
21 that you testified already today, we are talking about what was  
22 the first thing you did when you saw him cross the street.

23 "The witness" -- meaning you -- "He walked by and I asked  
24 him to stop. That's what I said.

25 A What did you say to him?

A 40

mbl6

Alesi - cross

1 "A. I told him to stop.

2 "Q. Is that the word you used, stop?

3 "A. More or less, yeah.

4 "Q. Stop, words to that effect, all right, and

5 he stopped?

6 "A. Yes."

7 Do you remember being asked those questions and making  
8 those answers in reference to a question by the presiding  
9 judge and the lawyer?

10 A. Yes.

11 Q. Is there any doubt in your mind now that on September  
12 5th that you told Mr. Magda to stop?

13 A. I guess I told him to stop.

14 THE COURT: Mr. Curley, I am going to have to suspend  
15 with this. The jury wants some testimony read. We have  
16 to find it first.

17 (Recess.)

18

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T 3 1 jg 1 Alesi - cross

2 THE COURT: All right, Mr. Curley. Let's  
3 proceed.

4 BY MR. CURLEY:

5 Q Did you ever speak to Mr. Magda about looking for  
6 a package in reference to that stopping on 43rd and Eighth  
7 Avenue on the 5th of September?

8 A No. I don't recall.

9 Q Did you say anything about taking him to look for  
10 the unidentified black male at that time?

11 A Yes.

12 Q What was that?

13 A I asked him to accompany me back to 43rd Street.

14 Q At what point in time was that?

15 A After he produced the marijuana cigarette. I  
16 placed him under arrest for that.

17 Q You testified concerning certain arrests that you  
18 had made, is that correct?

19 A I didn't hear the question. Sorry.

20 Q You testified concerning certain arrests that you  
21 had made.

22 A Yes.

23 Q Isn't it a fact that you had never made a narcotics  
24 arrest in that area until that day?

25 A Yes, that's true.

1                   jg 2

Alesi - cross

2                   Q    And you testified that you were walking with Mr.  
3                   Magda south on 43rd, correct?

4                   A    Yes.

5                   Q    And your beat ended at 42nd.

6                   A    Yes.

7                   Q    If Mr. Magda had continued to walk south on 43rd  
8                   beyond 42nd, would you have stopped him?

9                   MR. EPSTEIN:   Objection, your Honor.   Specula-  
10                   tion.

11                   THE COURT:   Sustained.

12                   MR. CURLEY:   Your Honor, I admit it is certainly  
13                   speculative to some extent.   I offer the question and  
14                   request an answer concerning the officer's state of mind,  
15                   which I think is a legitimate inquiry in this area.

16                   THE COURT:   When he saw him, wasn't he on his  
17                   beat at that time?   Wasn't he there then?

18                   MR. CURLEY:   Yes, he was within the confines  
19                   of his beat.

20                   THE COURT:   And he was walking down towards  
21                   42nd Street and he hadn't arrived at 42nd Street?

22                   MR. CURLEY:   That's correct.

23                   THE COURT:   I think I will sustain the objec-  
24                   tion.

25                   Q    If Mr. Magda had not stopped at the time you told

1 jg 3

Alesi - cross/redirect

2 him to stop, would you have placed him under arrest?

3 MR. EPSTEIN: Objection, your Honor. The same  
4 objection.5 THE COURT: I think that is a slightly different  
6 question, in a different area. I'll allow that question.

7 A No.

8 Q It is your testimony you would have allowed him to  
9 continue to walk away from you at that point?10 A My testimony is -- the answer to your question is  
11 no. What could I arrest him for? Failure to stop? What  
12 could I arrest him for? You asked me if I would have  
13 arrested him if he didn't stop, I said no. How could I  
14 arrest him? What would be the charge?

15 MR. CURLEY: No further questions.

16 THE COURT: Anything further, Mr. Epstein?

17 MR. EPSTEIN: Two questions, your Honor.

18 REDIRECT EXAMINATION

19 BY MR. EPSTEIN:

20 Q You testified that you have made narcotics arrests,  
21 have you not?

22 A Yes, I have.

23 Q In other areas, is that correct?

24 A Yes.

25 Q And you have witnessed other officers make narcotics

1       jg 4

Alesi - redirect

2       arrests in the 43rd Street area, is that right?

3       A    Yes, I have.

4       MR. EPSTEIN:   Nothing further.

5       THE COURT:    Is that your testimony?   You have  
6       witnessed other officers make narcotics arrests in that area?7       THE WITNESS:   Yes, sir.   I have never made a  
8       narcotics arrest on that street myself.   But I have been with  
9       other officers who have made narcotics arrests on that  
10      street.

11       THE COURT:   How many have you witnessed?

12       THE WITNESS:   I ha   witnessed two narcotics  
13      arrests on that street.

14       THE COURT:   In what vicinity?

15       THE WITNESS:   One in front of 300 West 43rd  
16      Street, which is about directly across from --

17       THE COURT:   From the park?

18       THE WITNESS:   No.   From approximately where I  
19      seen Mr. Magda.   It is on the south side of the street and  
20      one up, by the park.

21       THE COURT:   How long before this incident?

22       THE WITNESS:   About two months.

23       THE COURT:   What was there about the nature of  
24      the transaction that you saw between Mr. Magda and the black  
25      man that sensitized you to ask him to stop?   Because they

1      jg 5

Alesi -

2      were passing something?

3 THE WITNESS: At the location. And when the  
4 male black exchanged something and he seen me, he turned in  
5 a rapid motion and proceeded westbound --

6 THE COURT: In a what?

7 THE WITNESS: In a rapid movement and proceeded  
8 westbound on 43rd Street.

THE COURT: Was he a young man or an old one?

10 THE WITNESS: A young man.

11 THE COURT: All right. Thank you.

12 (Witness excused)

13 THE COURT: Anything further, Mr.

14 M. BERNSTEIN, *Journal of Polymer Science: Part A*, 2, 14 (1964).

15       witnesses.

THE COURT: All right.

Mr. Curley, anything from you?

18 MR. CURLEY: Yes, your honor. I call my  
19 client.

20

21 V I N C E N T A N T H O N Y M A G D A, the defendant,  
22 called as a witness in his own behalf, being first  
23 duly sworn, testified as follows:

24 MR. CURLEY: May I proceed, your Honor?

25 THE COURT: Yes.

A 46

1 jg 6

Magda - direct

2 DIRECT EXAMINATION

3 BY MR. CURLEY:

4 Q Would you give your name and address?

5 A Vincent Anthony Magda, 2243 Ryer Avenue.

6 Q You are a defendant in a bank robbery indictment  
7 before Judge Carter?

8 A Yes.

9 Q And you were a defendant in a criminal court case  
10 for possession of marijuana and an unloaded weapon in New  
11 York City Criminal Court?

12 A Yes.

13 Q And drawing your attention to the incident dis-  
14 cussed by Patrolman Alesi in his testimony earlier, on  
15 September 5th at approximately 3.00 p.m., what happened in  
16 reference to you and Patrolman Alesi, if anything?17 A I was walking down the street towards the Bus  
18 Terminal.19 Q All right. You say you were walking down the  
20 street. What street was that?

21 A Eighth Avenue.

22 Q And could you fix a point on Eighth Avenue where  
23 you were when you started walking? In other words, 50th  
24 St.? 46th? 43rd?

25 A I think it is 44th Street. I went and picked up

A 47

1 jg 7

Magda - direct

2 a newspaper for my sister from out of town, and I walked  
3 back -- that is, on Seventh Avenue by Broadway there is a  
4 big news stand there, and I walked back -- over Eighth  
5 Avenue, I think on 44th Street, and I made a left turn,  
6 turned south, and I was walking down. I crossed Eighth  
7 Avenue, yes, and I was walking down towards the Bus Terminal.

8 Q And what happened?

9 A The officer stopped me. He grabbed me by the  
10 shoulder.

11 Q What were you doing at that point?

12 A Carrying a newspaper, walking.

13 Q Had you just crossed the intersection of 43rd  
14 Street?

15 A This was about the middle of the block when he  
16 stopped me.

17 Q What block?

18 A Between 42nd and 43rd. I crossed 43rd Street  
19 and I was continuing on down. We were about in the middle  
20 of the block, I think.

21 Q And what happened?

22 A He grabbed my arm --

23 Q You say he grabbed --

24 A He grabbed my shoulder. He placed his left hand  
25 and he grabbed my shoulder. And at this time I didn't know

## A 48

1 jg 8

Magda - direct

2 he was a police officer. He was behind me.

3 Q All right. Let's stop for a moment now. Describe  
4 what he did to you, referring to right arm, left shoulder,  
5 et cetera, whenever possible. He came up to you from  
6 behind?

7 A Yes.

8 Q And what happened?

9 A I believe it was his left hand that he grabbed  
10 my shoulder.

11 Q Is that your right shoulder you are indicating?

12 A Yes, my right shoulder.

13 Q Continue.

14 A Then he spoke. He said, "What was that package  
15 you gave that guy?"16 And I looked down. I thought I had dropped  
17 one of the newspapers, and I looked down, and I said, "What  
18 package? What are you talking about?" And I looked up  
19 and I saw he was a police officer.20 Q When you looked up, where was he in reference to  
21 you? In front of you?22 A Immediately to my right. As he grabbed me, then  
23 he came forward. I had stopped once he grabbed me. I  
24 couldn't go anyplace. He had my shoulder.

25 Q When you say he had your shoulder, would you

1 jg 9

Magda - direct

2 describe how he had your shoulder, in terms of the area that  
3 his hands covered, the firmness of his grasp, matters like  
4 that?

5 A He grabbed my right shoulder on the top near my  
6 neck very strongly. I couldn't go anyplace. I would have  
7 to pull the coat off if I was to have gone away.

8 Q What is your height and weight?

9 A Five seven and a half, about 145, 150 pounds.

10 Q Continue.

11 A Well, he grabbed me, as I said, and he said, "What  
12 was that package?"

13 I looked down, saw that I had both the newspapers,  
14 and I said, "What package? What are you talking about?"  
15 And I saw that he was a police officer, and I looked at him.

16 He says, "I saw you with that black guy." And  
17 I says, "What are you talking about?"

18 He says, "All right. Come on." And he moved  
19 from in front of me and he grabbed me with his right hand  
20 and he grabbed the back of my coat, my jacket, and he pushed  
21 me forward up towards 43rd Street, and he says, "Come on.  
22 Where is that black guy? Would you know him if you saw him  
23 again?"

24 I says, "I don't know." And we continued  
25 walking up until 43rd Street and we stopped there and we

1      jq 10

Magda - direct

2      locked.    He was looking for the black guy.

3            Q    When you say you continued walking, we've been  
4      talking about the physical contact between you.    Was there  
5      any physical contact between you, meaning you and the police  
6      officer, while you were walking back to 43rd?7            A    Oh, yes.    He had me by the back of the coat all  
8      the time.    He never took his --

9            Q    Would you describe that?    Vividly.

10          A    After I told him I didn't know what he was talking  
11     about, he said, "All right.    Come on."    He was facing me,  
12     and he turned and he took his right hand and he grabbed up  
13     the back of my jacket by the collar and by the back and he  
14     held onto it and he pushed me forward.

15          Q    When you say "grabbed up," you mean pulled up?

16          A    Well, he got a good grasp on the jacket.

17          Q    Continue.

18          A    Well, he pushed me forward, literally.    He says,  
19     "Come on," and he pushed me up towards 43rd Street.20          Q    And while you walked with him to 43rd, during that  
21     period of time did he ever release you from that grasp?

22          A    No, sir.

23          Q    What happened at that corner when you went back  
24     to that location, if anything?

25          A    He wanted the black guy.    He was looking for the

1 jg 11

Magda - direct

2 black guy and he kept asking me about him, and I says I  
3 don't know. And then he took me and we went across the  
4 street and, I don't know, I think he called on his -- the  
5 radio he had. But people were starting to gather then,  
6 and we crossed 43rd Street and he put me up against the  
7 wall and he put his hand on the side of my coat. He slapped  
8 the side --

9 Q You are indicating. Would you go slower and  
10 repeat what you said?

11 A Yes. With his right hand he slapped my right side  
12 that was up against the wall, and apparently he felt the  
13 revolver, the automatic pistol.

14 And then there was a police car coming towards  
15 us, and he signalled and he got very excited and he reached  
16 in and he pulled out the gun that I had. And then he  
17 searched further and he found a marijuana cigarette in my  
18 lefthand pocket.

19 You see, I had a jacket where the pockets are  
20 inside, and he reached in and he found that.

21 Then other police officers came and he handed  
22 the pistol to the other police officer and put handcuffs on  
23 me and put me in a car and they drove me down to the precinct  
24 house.

25 Q Did there come a time when the exhibit in the

1       jg 12

Magda - direct

2       hearing was taken from you, indicating Exhibit 1, Government  
3       Exhibit 1, was taken from you?

4       A     Yes. They took me to the precinct house and I  
5       was brought before the lieutenant there, the big desk that  
6       is there, and the lieutenant told the police officer Alesi  
7       to search me, make sure that I had nothing else on me, which  
8       he did, and he stuck his hand in my lower lefthand pocket  
9       and he pulled out the paper, an envelope with the note in  
10      it.

11      Q     So that you had Government Exhibit 1, the note,  
12      on you at the time of your being taken into custody by the  
13      police officer.

14      A     Yes.

15      Q     And you also had on you an unloaded revolver, or  
16      pistol.

17      A     Yes.

18      Q     And you also had on you a marijuana cigarette.

19      A     Yes.

20      Q     Approximately at what point in time did you acquire  
21      the marijuana cigarette?

22      A     What do you mean?

23      Q     The cigarette that was taken from you by the  
24      police --

25      A     Where did I get it?

1 Jg 13 Magda - direct

2 Q When and where?

3 A Well, I had that. I had that from New Jersey.

4 Q Which?

5 A Pardon?

6 Q What are we talking about now?

7 A The cigarette.

8 Q And how about the revolver?

9 A I've had that a few years, quite a few years.

10 Q And Government Exhibit 1?

11 A When did I have that? What do you mean? I don't  
12 understand the question.

13 Q How long did you have it on your person before it  
14 was taken by the police department official?

15 A A few hours, I guess, maybe an hour and a half to  
16 two hours. No. I went to the movies. Let's see: nine  
17 to three. From about nine o'clock in the morning.

18 MR. CURLEY: No further questions.

19 CROSS EXAMINATION

20 BY MR. EPSTEIN:

21 Q Mr. Magda, directing your attention to 3.00 p.m.  
22 on September 5th, did you meet a black man on the corner of  
23 43rd and Eighth Avenue?

24 A Not on the corner.

25 Q Did you meet a black man near the corner of 43rd

1      JG 14

Magda - cross

2      and Eighth Avenue?

3      A    Yes.

4      Q    Did you know his name?

5      A    No.

6      Q    Had you ever seen him before?

7      A    No.

8      Q    What did you say to him?

9      A    I didn't say anything to him.

10     Q    You met with him, but you didn't say anything to  
11     him, is that it?

12     A    Yes.

13     Q    What did he say to you?

14     A    He asked me for change for a quarter.

15     Q    And what did you say?

16     A    Well, I looked in my pocket to see if I had it.

17     Q    And what did you say in response?

18     A    Nothing. I just gave it to him. I wouldn't  
19     say anything. I was afraid of him. I thought he was  
20     trying to --21     Q    You were afraid of him and then you gave him change  
22     for a quarter? Is that your testimony?23     A    Yes. I got scared when he stoped me. He says,  
24     "You got change for a quarter?" But I got scared, because  
25     you got mugged down there. I've been mugged before.

1 jg 15

Magda - cross

2 Q How did he stop you?

3 A Well, I was just walking down and he was just  
4 standing there. He was just there. All of a sudden it was  
5 like he was in front of me. I don't exactly know what you  
6 mean, how. He didn't grab me.

7 Q Was there anything to prevent you from continuing  
8 to walk away from him?

9 A No. I could have.

10 Q You were afraid of him and yet you stopped and  
11 offered him change for a quarter, is that your testimony?

12 A No, I didn't offer him. He asked me for it.

13 Q And you were afraid of him and yet you stopped and  
14 gave him change for a quarter?

15 A Well, I guess that's a bad way of putting it. I  
16 wasn't so much afraid of him in particular. It is just  
17 that he got me a little scared at that particular time.

18 Q Scared enough for you to reach into your pocket  
19 and give him change for a quarter?

20 A Well, when he asked me for the change, he said,  
21 "Do you have change for a quarter?" Then I knew it was  
22 nothing. So I just reached into my pocket and looked to see  
23 if I had change, which I did, and I handed it to him.

24 Q Have you been in the Eighth Avenue area before?

25 A Yes.

1      jg 16

Magda - cross

2      Q      Have you been accosted before by people asking you  
3      for change?

4      A      Yes.

5      Q      Many times, is that correct?

6      A      No.    Usually I just ignore them and walk away.

7      Q      No.    I asked, have you been previously approached  
8      by people who asked you for change?

9      A      Yes.

10     Q      And what do you customarily respond?

11     A      It depends on the person.    Customarily I walk  
12     away.

13     Q      But this time you stopped and gave him change, is  
14     that correct?

15     A      He asked for change of a quarter and he -- like  
16     I could see the quarter in his hand.    So, like he wasn't  
17     asking me for money.    He was asking me for change.

18     Q      And your testimony is you gave him change and  
19     then crossed 43rd Street, correct?

20     A      Yes.

21     Q      Your testimony is that you did not receive the  
22     marijuana cigarette from him, correct?

23     A      Nothing.

24     Q      You did not receive the marijuana cigarette from  
25     him, correct?

19 17

Magda - cross

2 A Not from him, no.

Q Where did you get the marijuana cigarette?

4           A    I had bought not cigarettes but loose marijuana  
5           earlier in the week.

6 O Where had you bought it?

## 7 A In the Bronx.

## 8 Q Where?

9 A Westchester -- yes, Westchester Square.

10. Excuse me. I didn't hear it.

3. Westchester Square. Over by Westchester Square.

12 Q. And how much did you purchase?

It is called a five dollar bag.

3. When did you purchase it?

... I think it was the

16 days -- no, it was Thursday, the Thursday or Friday before.  
17 That was a Monday, I believe. I don't know when, to tell  
18 you the truth. It was at least a day or two beforehand.

19 THE COURT: When did you say you purchased it?

THE WITNESS: In the Bronx, Westchester Square.

21 Q And how many cigarettes had you made from that  
22 five dollar bag?

23 A Four, five.

Q. And how many did you have left at that point?

25 A One

2 Q Is it your practice to carry marijuana cigarettes  
3 around with you?

4 A No.

5 Q Why were you carrying a marijuana cigarette with  
6 you that day?

9 Q. Do you smoke marijuana cigarettes with your sister?

10 A. No.

Q So why were you bringing it to her in New Jersey?

12 A I wasn't bringing it to her. I was saving it  
13 for myself.

14 Q Now, I believe it was your testimony that you  
15 crossed 43rd Street and at some point you felt Officer Alesi's  
16 hand on your shoulder, is that correct?

17 A Yes. I couldn't help feeling it.

Q. Did you walk past Officer Alesi?

18 A Oh, yes.

Q. Do you recall walking past him?

21 A Yes -

22 Q And yet it is your testimony that you didn't  
23 realize he was a police officer at first, is that correct?

24 A That's correct. I did not look at him when he  
25 first put his hands on me.

1      jg 19

Magda - cross

2      Q    But you just said that you had walked past him.

3      A    Yes.

4      Q    Did you see him as you were walking past him?

5      A    Yes.

6      Q    You saw him and you didn't realize he was a police  
7      officer, is that correct?

8      A    When he was standing there, yes, I could see him.

9      He was in his uniform. I don't understand why --

10     Q    I'm sorry. It is your testimony, I believe,  
11     that you didn't realize he was a police officer when he lay  
12     hands on you, is that correct?

13     A    That's right. I didn't look at him right away.

14     Q    But previously you had walked past him, is that  
15     correct?

16     A    That's correct.

17     Q    And you had looked at him, is that correct?

18     A    That's right.

19     Q    And he was in uniform, is that correct?

20     A    Yes.

21     Q    So you did realize he was a police officer.

22     THE COURT: That is not fair, Mr. Epstein.  
23     That is not his testimony. He testified he saw him and  
24     passed him. Then somebody grabbed him on the shoulder from  
25     the back and he didn't know that that was the police officer.

1      jg 20

'Magda - cross

2            Q    And then you turned around.    What was the first  
3            thing the officer said to you?

4            A    "What was that package you gave that guy?"

5            Q    And what was your response?

6            A    I looked down.    I had the papers here and I looked  
7            down to see if I had dropped the papers.    I figured -- he  
8            said "package," so I thought I dropped a newspaper or some-  
9            thing.    So I looked down.    Then I looked up and I said,  
10           "What package?"    And I turned toward him and I was then  
11           facing him.

12           Q    And what was the next thing that happened?

13           A    He says, "All right.    Come on."

14           Q    And where did you go with him?

15           A    Well, then he turned around and he grabbed me by  
16           the back of the jacket and he pushed me up to 43rd Street.

17           Q    How far did he push you?

18           A    Approximately three quarters of a block, about  
19           200 feet, I guess, 220 feet.

20           Q    Is it your testimony you were almost at 42nd Street?  
21           Is that correct?

22           A    Oh, yes.

23           Q    And he pushed you from 42nd Street to 43rd Street?

24           A    Approximately.

25           Q    Three quarters of that block.

1 jg 21

Magda - cross

2 A Yes.

3 Q Did he ever tell you you were under arrest?

4 A No.

5 Q Now, was there ever a time after he initially  
6 grabbed you that he released you, or did he always keep  
7 hands on you?8 A Well, in order to grab me with his right hand on  
9 the back of the neck, he had to take his left hand off of  
10 my right shoulder when I was facing him. So he did moment-  
11 arily release me, but very, very -- just a brief second. I  
12 would have had to push him away and run.13 Q When he pushed you up Eighth Avenue, was he standing  
14 beside you or walking behind you?

15 A Yes, on my left side.

16 Q And he was grabbing you how?

17 A With his right hand, the back of my jacket.

18 Q And what happened when you reached 43rd Street?

19 A He kept asking me where was the black guy, and he  
20 was looking for this black guy. And I says, "I don't know."  
21 I says, "I don't know him."22 He said to me, "He had a hat on, didn't he? Is  
23 that the guy?" And he pointed to some guy with a hat. And  
24 I says, "I couldn't tell you. I don't know."

25 And then we crossed 43rd Street and I think he

1      jg 22

Magda - cross

2      called on his radio for a car and he put me up against a  
3      building and started slapping my sides.

4      Q      Did he ever advise you of your rights?

5      A      No.

6      Q      When were you first advised of your rights?

7      A      I was never.

8      Q      You were never advised of your rights, is that  
9      correct?

10     A      Yes.

11     Q      Were you advised of your rights at the station  
12     house?

13     A      At the station house, when I was being booked, he  
14     said to me, he said, "I don't have to read you your rights,  
15     do I, Vinnie?" I says, "No."

16     Q      And you were interviewed by an FBI agent Pat  
17     Mitchell, weren't you?

18     A      Yes.

19     Q      Did he advise you of your rights?

20     A      No. He asked Officer Alesi something about that.

21     Q      I see. And Agent Mitchell never advised you of  
22     your rights.

23     A      No.

24     Q      And you were taken to the U. S. Attorney's office,  
25     weren't you, at some point?

2 A Yes.

3 Q And were you interviewed by an Assistant named  
4 Alan Bentley?

5                          A      Yes.

6 Q Did he advise you of your rights?

7 A Yes.

8 Q He was the first person to advise you of your  
9 rights, is that correct?

10 A Yes.

11 Q No police officer ever did and no FBI agent ever  
12 did.

13 A No.

14 Q Now, you also made reference to people gathering  
15 as you were being pushed up Eighth Avenue, is that correct?

A Not as I was being pushed up Eighth Avenue.

17 Q At what point did people begin to gather?

18 A When we got to 43rd Street and he was pushing me  
19 against the wall.

20 Q How many people gathered?

21                   A    Approximately twenty, twenty five people.    Some-  
22                   body had a camera.

23 Q Where were you facing at that point?

24 A I was facing a wall.

25 Q And yet you are sure that twenty people gathered

1 jg 24

Magda - cross

2 there and someone had a camera.

3 A Yes. I turned around. I turned around to look  
4 back. When Alesi took the gun out of my jacket pocket, I  
5 turned around, and I could see the people, and another  
6 police -- two other officers were in a squad car.

7 Q And what pocket was the gun in?

8 A My right inside pocket.

9 Q And what pocket was the demand note in?

10 A My left lower inside pocket.

11 Q And in what pocket was the marijuana cigarette?

12 A The left top inside pocket.

13 Q Finally, Mr. Magda, you were present in Criminal  
14 Court on November 14th, is that correct?

15 A Yes.

16 Q And you heard Officer Alesi testify in Criminal  
17 Court, is that correct?

18 A Yes.

19 Q Did you testify in Criminal Court on that day?

20 A No.

21 Q Did your lawyer ask you whether you wanted to  
22 testify?

23 A No.

24 Q Did you tell your lawyer you wanted to testify?

25 MR. CURLEY: I object to this, your Honor.

1      jg 25

Magda - cross

2      Beside being irrelevant, it seems to be a privileged communica-  
3      tion.

4                    MR. EPSTEIN: I'll withdraw the question.

5                    Q      You sat in Criminal Court and heard Mr. Alesi  
6      testify on November 14th, is that correct?

7                    A      Yes.

8                    Q      And his testimony was substantially the same on  
9      that day as it is today, is that correct?

10                  A      Well, it is a little bit different.

11                  Q      And yet you had no desire to testify to correct  
12     any of the obvious errors in his testimony, is that correct?13                  MR. CURLEY: Objection, your Honor. It is a  
14     decision for counsel to make, not for a defendant to make.15                  THE COURT: No. I think he has a right to ask  
16     that question. He can answer it.17                  MR. CURLEY: I would ask your Honor, in light  
18     of your Honor's ruling, that my client should be directed to  
19     answer only yes or no.

20                  THE COURT: All right.

21                  MR. CURLEY: Which I think the question really  
22     calls for. But it is a long question.

23                  THE COURT: All right.

24                  Do you remember what the question is?

25                  THE WITNESS: No.

1 jg 26

Magda - cross

2 THE COURT: You can restate it.

3 Q You sat in Criminal Court on November 14th and  
4 heard the officer testify, is that correct?

5 A Yes.

6 Q Is it your testimony now that the officer was lying?

7 MR. CURLEY: I would object to that, your Honor.  
8 It is argumentative. In addition, it is too general. We  
9 are talking about perhaps thirty or forty questions.

10 THE COURT: Well, I don't --

11 MR. EPSTEIN: I can break it down, if Mr.  
12 Curley would prefer.13 THE COURT: He said the question before him is, is  
14 the officer's version of what occurred untrue, the officer's  
15 testimony as to what occurred untrue. I don't see anything  
16 wrong with that necessarily.17 MR. CURLEY: Well, your Honor, I think there  
18 are many areas in which there are substantial agreements.

19 I would agree to the conclusion, whether legal or factual --

20 THE COURT: Well, there is substantial agreement  
21 that they were both in the vicinity of 43rd Street and Eighth  
22 Avenue on September 5th at 3.00 p.m., that's the  
23 substantial agreement, and that he was stopped and eventually  
24 found. That's the substantial agreement.

25 The objection is overruled.

1 jg 27

Magda - cross

2 Q Is it your testimony now that portions of Officer  
3 Alesi's testimony were untrue?

4 A Well, I don't think --

5 MR. CURLEY: I would ask for a clarification,  
6 your Honor, as to which day that the officer testified that  
7 Mr. Epstein is referring to.

8 Q The portion of his testimony today.

9 A I don't think that he lied. I think that he  
10 doesn't remember a lot of things and that you know, he had  
11 a lot of other arrests. Maybe he was busy.

12 Q You heard Officer Alesi testify that he tapped you  
13 on the shoulder, is that correct?

14 A Yes.

15 Q Was that true?

16 A Not really. He grabbed me.

17 Q You heard Officer Alesi testify that he asked you  
18 about an exchange you had made with the black man, is that  
19 correct?

20 A Yes.

21 Q And you heard Officer Alesi testify that you said  
22 that you had purchased a marijuana cigarette, is that  
23 correct?

24 A Yes, I heard it.

25 Q Was that testimony truthful?

1 jg 28

Magda - cross

2 A I don't really think so.

3 Q In other words, in that particular, Officer Alesi  
4 was lying, in your opinion?5 A I wouldn't say lying. I think the man doesn't  
6 recall things and maybe he is just saying something.7 Q And that is just an error in recollection, is that  
8 correct?

9 A I don't understand.

10 MR. EPSTEIN: Withdrawn.

11 Q You also heard Officer Alesi testify that you  
12 withdrew the marijuana cigarette and gave it to him. Is  
13 that correct?

14 A Yes.

15 Q Did you withdraw the marijuana cigarette and give  
16 it to him?

17 A No. He found it.

18 Q So his testimony in that regard was untruthful, is  
19 that correct?

20 A Well, I guess so.

21 Q His testimony was untruthful?

22 A When you say "untruthful," to me it implies like  
23 someone would be lying purposely to achieve something, and  
24 I don't think the officer would do that. If you were to  
25 ask me do you think it was incorrect, I would say yes. But

1      jg 29

Magda - cross

2      I couldn't say yes or no to that.

3            Q    Mr. Magda, you sat in Criminal Court and heard  
4      Officer Alesi give a version of the facts, is that correct?

5            A    When?    Today?

6            Q    November 14th.

7            A    The 14th, yes.

8            Q    And would it be fair to say that you took issue with  
9      his version in some particular?

10          A    I don't understand.    What do you mean?

11          Q    Would it be fair to say that your version would  
12      have differed from his?

13          A    Yes.

14          Q    And yet you had no desire to testify on that day  
15      and correct any of the errors in his version.

16          MR. CURLEY:    Objection.    Irrelevant.

17          THE COURT:    Well, I think the form of the ques-  
18      tion is improper.    The issue is not whether he desires to  
19      but whether he did in fact testify.

20          Q    You did not testify on that day, is that correct?

21          A    No.

22          MR. EPSTEIN:    I have nothing further.

23          THE COURT:    Anything further, Mr. Curley?

24          MR. CURLEY:    No questions.

25          THE COURT:    Is that it?

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1      jg 30

2      MR. EPSTEIN:    We have nothing further.

3      MR. CURLEY:    The defendant rests, your Honor.

4      THE COURT:    You may step down.

5      (Witness excused)

6      THE COURT:    Have you supplied me with a memo-  
7      randum?

8      MR. EPSTEIN:    Yes, your Honor, I have.

9      THE COURT:    Mr. Curley, you are going to supply  
10     me with a copy of the transcript and a memorandum?

11     MR. CURLEY:    Yes, your Honor.

12     Your Honor, I am not sure if Mr. Epstein is  
13     aware in this case what the state judge relied upon. It is  
14     not analyzed in the judge's decision, but I think clearly  
15     it is the case in question, *People v. Cantor*, 36 NY 2d 106.  
16     And it is presented officially in an advance sheet. I  
17     don't think it is in a bound volume yet.18     That case, of course, discusses not only the New  
19     York law, since it was an arrest made by a New York police  
20     officer, as this case, but also interprets the federal cases,  
21     including, I think, several of the cases cited by Mr. Epstein  
22     in his brief.23     I think one further matter should be brought to  
24     your Honor's attention because of the calendar situation.  
25     Mr. Magda, through counsel, has previously indicated that

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2 the suppression hearing was the heart of the defense case,  
3 and informally, I think, Mr. Epstein and I have agreed as to  
4 this, and what I'm leading to, your Honor, is that we are  
5 prepared to concede that if the evidence is admissible, it  
6 is in a sense overwhelming, and we are prepared to enter  
7 into a suitable stipulation, followed by the entry of a plea  
8 of guilty, by either side to renew the search and seizure  
9 issue in the appellate courts.

10 So that both sides do not see the need for a  
11 trial in this case and we would like to, as we have said,  
12 submit memos and work out a stipulation suitable to your  
13 Honor. I assume, if the motion is in favor of the defendant,  
14 Mr. Epstein would confer with his office as to whether or  
15 not the Government wishes to appeal, and if the decision is  
16 in favor of the Government, we would consider the entry of  
17 a plea of guilty to whatever arrangement is suitable to the  
18 Government and discuss the possibility of appeal from that  
19 point.

20 THE COURT: All right.

21 MR. CURLEY: So that we don't see any need for  
22 a trial in this case to interfere with your Honor's trial  
23 calendar, and I have my client's consent to advise the Court  
24 of that fact.

25 THE COURT: All right.

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2                    MR. CURLEY: I am just curious. I am prepared  
3                    to proceed without the minutes. But it may be helpful to  
4                    get the minutes with quotations.

5                    THE COURT: It seems to me that I have to study  
6                    the minutes and what's in them, I mean the transcript.

7                    MR. CURLEY: Fine.

8                    THE COURT: The critical issue, it seems to me,  
9                    in this case is whether the Government has shown and estab-  
10                  lished that the officer, under the circumstances of the  
11                  case, had a reasonable basis to stop the defendant. And  
12                  if they have established that, then we have one thing. If  
13                  they haven't established it, it is another.

14                  So that I think I would like some discussion of  
15                  that from both of you. This is a case where the law, I  
16                  think, depends upon what the evidence shows.

17                  All right.

18                  MR. CURLEY: Therefore I would suggest that we  
19                  order the minutes and be given a few days after the minutes  
20                  are received to submit the memorandum that we have mentioned,  
21                  if that is convenient to the Court.

22                  MR. EPSTEIN: Your Honor, for the record, I  
23                  will represent that if the evidence is suppressed, our entire  
24                  case is tainted by the illegality of the search and seizure.

25                  THE COURT: I know. You told me that.

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2      MR. EPSTEIN:   Yes.

3      THE COURT:   It is very funny how these cases  
4      occur in droves.   This is my second one in this period that  
5      is going to hinge on whether the evidence is suppressable.

6      When is the transcript going to be ready?

7      Monday?   How long after Monday do you want for your brief?

8      MR. CURLEY:   I would like a week.

9      MR. EPSTEIN:   And if I could submit something  
10     supplemental within Mr. Curley's week.11     THE COURT:   All right.   Then we are talking  
12     about, roughly, the 8th of December.   And I will want  
13     submitted with your brief a copy of that case you are relying  
14     on and the transcript in the state court.   And I will decide  
15     the case as soon as I can, and it is off the calendar at  
16     the present time.

17     MR. EPSTEIN:   Fine, your Honor.   Thank you.

18     - - -

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2 WT INDEX

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2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 THE UNITED STATES OF AMERICA, :  
6 Plaintiff, :  
7 vs. : 75 CR. 942

8 VINCENT ANTHONY MAGDA, :  
9 Defendant. .  
10 -----x

11 December 15, 1975  
12 10:15 a.m.

13 BEFORE:  
14

HON. ROBERT L. CARTER,

15 District Judge.  
16

17 A P P E A R A N C E S:

18 THOMAS J. CAHILL, ESQ.  
19 United States Attorney for the  
20 Southern District of New York,  
21 BY: JEREMY G. EPSTEIN, ESQ.,  
22 Assistant United  
23 States Attorney  
24  
25 JOHN P. CURLEY, ESQ.  
26 Attorney for defendant.

1 gwj

2 (Case called.)

3 THE CLERK: Is the Government ready?

4 MR. EPSTEIN: The Government is ready, your  
5 Honor.

6 THE CLERK: Is the defendant ready?

7 MR. CURLEY: The defendant is ready, your  
8 Honor.

9 THE COURT: All right, let's proceed.

10 MR. CURLEY: Your Honor, the defendant calls  
11 the defendant's sister, Virginia Lees.12 MR. EPSTEIN: Your Honor, may the other wit-  
13 nesses be excluded from the courtroom at this time?

14 THE COURT: Yes, that is right.

15 V I R G I N I A      L E E S,      called as a witness by  
16 the defendant and having been duly sworn, testified  
17 as follows:

18 DIRECT EXAMINATION

19 BY MR. CURLEY:

20 Q Mrs. Lees, are you the sister of the defendant  
21 in this case, Vincent Anthony Magda?

22 A Yes, sir.

23 Q Where do you live?

24 A 19 Campbell Road, Kendall Park, New Jersey.

25 Q Did there come a time when you learned that

2 Patrolman Aleisi, who had arrested your brother, had testi-  
3 fied your brother had handed a marijuana cigarette to  
4 Patrolman Aleisi?

5 MR. EPSTEIN: Objection to the leading, your  
6 Honor.

7 THE COURT: I think that objection is valid,  
8 Mr. Curley.

9 Sustained.

10 Q Do you know whether or not Patrolman Aleisi  
11 testified in this Court that he had received--

12 THE COURT: I thought what Mrs. Lees and the  
13 other people were here for were to testify to some communi-  
14 cation they had had from someone on the scene. If that is  
15 so, then ask that.

16 MR. CURLEY: All right, your Honor. I had  
17 anticipated based upon some discussion with Mr. Epstein  
18 that the timeliness of this might be in question.

19 THE COURT: What timeliness?

20 MR. CURLEY: The fact that the affidavit was  
21 submitted several days after the hearing.

22 THE COURT: That has nothing to do with anything.  
23 I have opened the hearing. I have opened it on the grounds  
24 that you have indicated that there is some information that  
these witnesses have which would be illuminating. I think

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2 you should go right to it.

3 Q Drawing your attention to the afternoon and  
4 early evening of September 5, 1975, where were you?

5 A Home in New Jersey.

6 Q Did you receive a telephone call?

7 A Yes, I did.

8 Q From whom?

9 A My brother.

10 Q After receiving that telephone call from your  
11 brother, what did you do?12 A I called my mother and then my other sister and  
13 when I called the stationhouse back again where he was.

14 Q Excuse me.

15 When you spoke to your brother, were you advised  
16 that he was in the stationhouse?

17 A Yes, sir.

18 Q So when you say you called the stationhouse  
19 back again, you were referring to the stationhouse in which  
20 he had been when he had been speaking to you after he had  
21 been arrested?

22 A Yes, sir. He gave me the number to call back.

23 Q What did you do when you called the station-  
24 house in terms of who answered the phone and what was said?

25 A A girl answered the telephone. I told her I

1 gwjb

2 was Virginia Lees, Vincent Magda's sister, and she said,  
3 "Yes, just a minute. The arresting officer is right here."

4 Patrolman Aleisi got on the phone.

5 Q You say he got on the phone.

6 Was there any exchange of names?

7 A Yes. He said, "I'm the arresting officer,  
8 Patrolman Salvatore Aleisi. I just arrested your brother."

9 I asked him, you know, "What happened? Why?  
10 What was going on?"

11 Q Continue. What was the extent of the conver-  
12 sation?

13 A He told me that he was down on 42nd Street or  
14 43rd--I'm not sure--and he was looking suspicious and there  
15 was another guy with him and when he went to walk towards  
16 him or something like that the other guy took off. When  
17 he went up to Vincent, my brother, he asked him what he  
18 was doing, and Vincent said nothing.

19 Then he told me he took him down the street or  
20 down the block--I'm not sure--and he searched him and he  
21 found a gun and a marijuana cigarette. He said marijuana.  
22 That's what he said.

23 I got upset, you know. I said what?

24 He said--as a matter of fact, he didn't call  
25 me Mrs. Lees, he called me Virginia.

2 He says, "Virginia, don't get upset." He said  
3 that it was only a joint. He said, "I wouldn't even have  
4 arrested him for that. He's a nice guy."

5 He said he had a gun on him. He said, "Don't  
6 worry about it, the gun wasn't loaded, but it's still a  
7 legal weapon and I had to arrest him for it."

8 Q After speaking to Patrolman Aleisi, did you  
9 speak by telephone with your mother or other sister?

10 A Yes, I did.

11 Q After speaking with these two women, did you  
12 have occasion to speak again with Patrolman Aleisi?

13 A Yes, I did.

14 Q Tell us, approximately, in point of time when  
15 that was after the first call.

16 A Approximately anywhere from a half hour to an  
17 hour. I'm not sure of the time.

18 Q Where were you at this point?

19 A Still in New Jersey. I had called back again  
20 to tell the officer that I had gotten, you know, ahold of  
21 them and, you know, told them what had happened and that,  
22 you know, somebody would be down there either tomorrow morn-  
23 ing or whatever because I was in Jersey. I couldn't do  
24 anything. They live here in New York, you know. This was--  
25 this was to Officer Aleisi.

2 he says to me--

3 Q Excuse me.

4 You are saying that you made a second telephone  
5 call from your house to the precinct?

6 A Yes.

7 Q What happened when you made that phone call in  
8 terms of who answered the phone and what was said?

9 A Well, the girl answered the phone again.

10 I asked to speak to Officer Aleisi, that this  
11 was Vincent's sister again, because I knew I couldn't speak  
12 to him.

13 I told Officer Aleisi--

14 Q Excuse me.

15 Again, someone got on and there was an exchange  
16 of names; is that it?

17 A Yes. I asked to speak to Officer Aleisi.

18 Q Did you recognize his voice--

19 A Yes. She said, "Yes, he's right here."

20 Q Continue.

21 A He got on again.

22 I said, "Officer Aleisi, would you please tell  
23 Vincent I got ahold of my father and they will see if they  
24 can come down tonight or tomorrow morning or whatever."

25 I said to Mr. Aleisi, to Officer Aleisi, that,

2 you know, somebody would be in contact with him.

3 He said, "Well, we have another problem right  
4 now."

5 I said, "What's the matter now?"

6 He said, "Well, when they brought your brother  
7 down here, they searched him and they found a note on him."

8 I said, "What kind of a note?"

9 He said, "A note that refers to bank robbery."

10 THE COURT: I don't think any of this, Mr.  
11 Curley, is helpful.

12 MR. CURLEY: Excuse me?

13 THE COURT: This isn't helpful.

14 The only thing that is illuminating about the  
15 circumstances leading to his arrest is the first conversa-  
16 tion. This isn't helpful.

17 Q Mrs. Lees, during this second telephone conver-  
18 sation, was there any conversation or repetition of the  
19 previous conversation concerning the marijuana cigarette  
20 and the gun and how it was obtained?

21 A Oh, when he first got on, yes.

22 THE COURT: Are you telling me when Officer  
23 Aleisi first got on he took you through the same conversa-  
24 tion you had in the first telephone call?

25 THE WITNESS: Not the whole thing. He said

2 along with the gun and the cigarette there's now a note  
3 that the officers found on him.

4 THE COURT: That is not really repeating the  
5 conversation, is it?

6 As I understand it, he told you that they found  
7 a note when they searched him in addition to the gun and  
8 the cigarette?

9 THE WITNESS: Yes.

10 THE COURT: He didn't really go through the  
11 conversation telling you the same things he told you in  
12 the first telephone call, did he?

13 THE WITNESS: Well--

14 THE COURT: The answer is yes or no. Did he?

15 THE WITNESS: That's what he said the second  
16 time, you know, along with the gun and the note--along  
17 with the gun and the marijuana.

18 THE COURT: He didn't go through--

19 THE WITNESS: He didn't say the whole big thing  
20 again, no.

21 THE COURT: All right. Thank you.

22 MR. CURLEY: I have no further questions.

23 CROSS EXAMINATION

24 BY MR. EPSTEIN:

25 Q Mrs. Lees, when did you call the precinct on

1 gwjb

2 September 5th?

3 A When?

4 Q Yes, for the first time.

5 A It was after dinner. I really don't know,  
6 5:30, five. Anywhere from five to six. I know it was  
7 around dinnertime.

8 Q And you spoke to a woman; is that correct?

9 A Yes.

10 Q What was the first thing you said on the phone?

11 A I said, "I'm Virginia Lees, Vincent Magda's  
12 sister."13 Q There came a time when you spoke to Officer  
14 Aleisi; is that correct?15 A Yes. She said, "Oh, yes, the arresting officer  
16 is right here."

17 Q And you spoke to him; is that correct?

18 A Yes. He got on the phone and he said, "Officer  
19 Salvatore Aleisi. I'm the arresting officer. I arrested  
20 your brother."

21 Q What was the first thing you said to him?

22 A What is the first thing I said to him?

23 Q Yes.

24 A "What happened?"

25 Q What did he say?

1 gwjb

Lees-cross

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2 A Well, he went into the big long--

3 THE COURT: What he wants you to do, Mrs. Lees,  
4 is not to tell us he went through a big long, but tell us  
5 precisely what you said to him and what he said to you.6 A (Continuing) He told me that he was on duty  
7 down on 42nd Street or 43rd--I'm not sure--and Vincent was  
8 down there, he was lookin' suspicious. He was talking to  
9 some guy. He said he thought something about a transaction  
10 was going on, but he wasn't sure.

11 He said this guy took off.

12 He said, "When I went over to Vincent, I asked  
13 him what he was doing."

14 He said, "Vincent told me nothing."

15 I think he said he took him down the block or  
16 he took him in a corner. I'm not sure if he said down the  
17 block or in a corner.18 He said, "I searched him. When I searched him,  
19 I found a gun and marijuana."

20 That's exactly what he said to me.

21 I said, "What?"

22 He said to me, "Don't get excited. It was only  
23 a joint."

24 You want me to finish?

25 Q Yes, please.

2 A He said, "I wouldn't have arrested him for that,  
3 but he had a gun on him."

4 Then he said to me, "Don't let that excite you.  
5 The gun wasn't loaded."

6 He said, "It's a legal weapon, but it's only a  
7 misdemeanor."

8 Q Did he say anything else to you about the  
9 arrest that you can recall? Is the answer no?

10 A No, not that I can recall right now.

11 Q You are certain that everything you have just  
12 testified to came from this conversation with Officer Aleisi?

13 A Yes, sir.

14 Q Did Officer Aleisi say to you that Mr. Magda had  
15 given him a cigarette?

16 A No, sir.

17 Q Did Officer Aleisi say that he had found the  
18 cigarette as a result of the search conducted of Mr. Magda?

19 A Officer Aleisi told me that when he searched  
20 Vincent, he found a gun and marijuana on him.

21 Q So he said he found the cigarette as a result  
22 of the search he had conducted; is that correct?

23 A Yes.

24 Q Did he ever say to you that Mr. Magda had ad-  
25 mitted purchasing a marijuana cigarette?

1 gwjb

2 A No, sir.

3 Q You are sure of that?

4 A Yes, sir.

5 Q Did he state that Mr. Magda had made any re-  
6 marks to him at all at the time of the arrest?7 A The only thing he said, that Vincent said, he  
8 asked him what he was doing, and Vincent said nothing. So  
9 evidently the only thing--10 Q That was the only remark that he related to  
11 you?

12 A Yes, sir.

13 MR. EPSTEIN: Your Honor, I suppose we ought  
14 to have this marked as Exhibit 1 unless Mr. Curley has sub-  
15 mitted the original of the affidavit to you already.16 MR. CURLEY: The original was sent to the  
17 court, your Honor. I have no objection to such marking of  
18 this exhibit for the purpose of the hearing.19 (Government's Exhibit 1 marked for identifica-  
20 tion.)

XXX

21 Q Mrs. Lees, I show you what has been marked as  
22 Exhibit 1 and I ask if that is the affidavit that you  
23 executed.

24 A Yes.

25 Q Did you prepare the affidavit?

2 A Yes, sir. You mean did I type it up and all  
3 that? Yes.

4 Q Is the wording yours?

5 A No, I got it from--they wanted me to come down  
6 and I couldn't.

7 So they called me up and just--they told me  
8 to put the top of it in until I got to the middle part and  
9 fill whatever I said in.

10 Q Did you write this affidavit?

11 A Did I write it up and type it up? Yes, I did.

12 Q You typed it up?

13 A Yes.

14 Q Did you devise the wording of the affidavit?

15 A No.

16 Q Who devised the wording of the affidavit? Was  
17 it your brother?

18 A Yes--I think it was Mr. Curley.

19 Q Do you have a recollection of who it was?

20 A Yes, Mr. Curley.

21 Q Were you present when the affidavit was drafted?

22 A No, sir.

23 Q Do you know when the affidavit was drafted? It  
24 is dated December 6th and you signed it.

25 A I wrote that. I typed that and wrote that my-

1 gwjb

2 self.

3 Q Someone told you to write it; is that correct?

4 A He just told me the wording, the words on top  
5 that I didn't know. In other words, the legal wording.

6 You want to know how this came about?

7 THE COURT: Answer the question.

8 A (Continuing) That's all he told me, the legal  
9 wording on top. He didn't tell me my conversation that I  
10 put in. He just told me the legal way of writing it.

11 (Continued on page 86.)

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2 Q "He" being whom?

3 A Mr. Curley.

4 Q Mrs. Lees, you state in this affidavit that you we  
5 were advised through Vincent A. Magda today that Salvator  
6 Aleisi testified that he did not search Vincent A. Magda  
7 until after Vincent A. Magda had given Patrolman Aleisi the  
8 cigarette.

9 Q When were you so advised?

10 A When was I so advised?

11 Q Yes.

12 A That was between when?

13 Q This is dated December 6th.

14 A December 4th.

15 Q December 4th being what day?

16 A What day?

17 Q Yes.

18 A I don't know.

19 Q I believe it was a Thursday, isn't it?

20 MR. CURLEY: Excuse me. I don't think there  
21 was an answer for the record.22 Would you speak up, Mrs. Lees, instead of shaking  
23 your head.

24 A Oh, yes.

25 Q Prior to December 4th, did you have a conversation

2 with Mr. Magda about the hearing that was conducted in this  
3 court?

4 A No, I did not.

5 Q December 4th was the first conversation you had  
6 with him?

7 A Yes, sir.

8 Q And what did he say at that conversation?

9 A What did he say?

10 Q Yes.

11 A What did he say?

12 He told me that I had to make up an affidavit and  
13 send it to the court and that Mr. Curley would word it for  
14 me and I would put in my own words and then type it up and  
15 send it out the next morning.

16 Q But you say in this affidavit that he also told  
17 you what Officer Aleisi had testified to?

18 A Yes. But that was the first time I knew about  
19 it.

20 Q Mrs. Lees --

21 A I didn't even know he went to court.

22 Q Mrs. Lees, on December 4th Mrs. Magda told you  
23 that you had to execute an affidavit, is that correct?

24 A Yes.

25 Q Prior to that, did he tell you anything about

1 gtbr 2

Lees-cross

2 Officer Aleisi testimony at a hearing?

3 A Did he tell me? No, he did not.

4 Q Did he give you any reason, therefore, for  
5 executing an affidavit?

6 A Did he give me any reason?

7 No. My sister had called me.

8 Q It is your testimony now, Mrs. Lees, I take it,  
9 that Mr. Magda never discussed Mr. Aleisi's testimony with  
10 you?11 A Only December 4th, that morning. He just said  
12 I had to write up the affidavit.

13 Q Mrs. Lees, let me repeat the question.

14 Is it your testimony now that Mr. Magda never  
15 discussed Officer Aleisi's testimony with you?

16 A No, it is not. That morning he did.

17 Q What did he say about it?

18 A What did he say about it?

19 Q Yes.

20 A What I have in the affidavit.

21 Q I would like to hear it in your own words,  
22 please.23 A Well, he said -- I can't put it because it  
24 all goes back to December 4th night, you understand me,  
25 and it is getting me very confused and I have never been on

1 gtbr 4

Lees-cross

2 the stand before.

3 If I can bring it up to there, then I can let you  
4 know.

5 THE COURT: No, you have to answer the questions.

6 THE WITNESS: I don't understand what he is  
7 saying.8 THE COURT: He asked you what were you told about  
9 Patrolman Aleisi's testimony, that's all.10 A Well, see, my brother called me on December 4th  
11 in the morning and I had told him --12 THE COURT: You don't have to go through all  
13 that.14 Just tell us, what did he tell you about the  
15 patrolman's testimony? It is simple enough.16 THE WITNESS: What he had told me about what went  
17 on here?

18 Q Yes.

19 A See, he -- he actually didn't tell me what went  
20 on here.

21 THE COURT: Who told you what --

22 THE WITNESS: My ssiter. This is what I am  
23 trying to get out.24 He didn't tell me what went on here. The  
25 only thing he had told me was that Mr. Curley wants this

1 gtbr 5 Lees-cross

2 written up legal, and I said I do not know how to make it  
3 legal.

4                   Actually, I told him what the officer had told  
5 me over the phone. He didn't even know I talked to him.

6                   Q        Mrs. Lees, in this affidavit you state,  
7                    "I was recently advised through Vincent A. Magda  
8                    that Salvatore Aleisi testified that he did not search  
9                    Vincent A. Magda until after Vincent A. Magda gave  
10                   Patrolman Aleisi the cigarette.

11                   You have just stated here that he didn't tell  
12 you anything about the testimony. Which is correct.

13                   A        But my sister told me first. That is what  
14 I said, Vincent didn't tell me that first, my sister did.  
15 But I can't put that down, that my sister put that down  
16 first. That's not too legal, is it?

17                   Q        Read the affidavit, Mrs. Lees.

18                   A        I know what the affidavit says.

19                   Q        The affidavit says you learned this from  
20 Vincent Magda and your testimony now is that that was false,  
21 is that correct?

22                   A        That I learned exactly what happened from the  
23 court here.

24                   Q        Vincent A. Magda.

25                   A        Yes, that's false.

1 gtbr 6 Lees-cross

2 A That's false?

3 A But I don't know how to write up a legal  
4 document.

5 Q Are you aware that Officer Aleisi testified in  
6 criminal court on November 14th?

7 A No, I was not.

8 Q Were you present in court at that time?

9 A No, I was not.

10 Q And do you know what the substance of his  
11 testimony was on that day?

12 A No, sir.

13 Q Did you ever have a conversation with Mr. Magda  
14 regarding that testimony?

15 A Regarding what testimony?

16 Q The criminal court testimony on November 14th?

17 A No, sir.

18 Q Are you aware that Mr. Magda had proceedings in  
19 criminal court?

20 A No, sir, not till December 3rd night, when my  
21 sister called me and told me.

22 MR. EPSTEIN: I have nothing further.

23 REDIRECT EXAMINATION

24 BY RM. CURLEY:

25 Q Is it your testimony that up until recently,

1 gtbr 7

Lees-redirect

2 you did not have any discussion with your brother concerning  
3 the facts involving his arrest and the crimes for which he  
4 had been charged?

5 A He wouldn't let us say anything about the  
6 case.

7 THE COURT: That is really not the issue.

8 A He wouldn't even talk about it.

9 THE COURT: Mr. Curley, let us proceed.

10 Q Your testimony is that before preparing the  
11 affidavit that has recently been shown to you, you had a  
12 telephone conversation with your sister?

13 A Yes.

14 Q And is that sister Mrs. Patricia Dunbar, who is  
15 a future witness in this proceeding?

16 A Yes.

17 Q And did she advise you of the substance of  
18 Patrolman Aleisi's testimony before Judge Carter?

19 A Yes.

20 Q And it was the substance of that conversation  
21 with Mrs. Dunbar that you had shortly thereafter with your  
22 brother, Mr. Magda?

23 A Yeah, yeah, the next morning.

24 Q Were you advised to submit an affidavit, the  
25 affidavit that you did submit, containing certain basic

1 gtbr 8 Lees-redirect

2 preliminary matter and then your recollection of the conver-  
3 sation with Patrolman Aleisi?

4 A Yes, sir, by you.

5 THE COURT: Mr. Curley, you are testifying.

6 You are testifying.

7 A Oh, you want me to tell you what happened?

8 THE COURT: You are testifying.

9 You know, I think I have heard enough.

10 MR. CURLEY: I have nothing further.

11 MR. EPSTEIN: Your Honor, I neglected to offer  
12 this in evidence and I would offer it at this time.

13 THE COURT: All right.

14 Other than that, I have nothing.

15 THE COURT: Mrs. Lees, thank you very much.

16 You may step down.

17 (Witness excused.)

18 THE COURT: Do you have any other witnesses?

19 MR. CURLEY: Yes, I call the defendant's  
20 mother. She is in the hall.

21

xx 22 (Government's Exhibit No. 1 was received in  
23 evidence.)

24

25

1 gtbr 9

2 M A R G A R E T M A G D A, called as a witness

3 by the defendant, having been first duly sworn,

4 testified as follows

5 DIRECT EXAMINATION

6 BY MR. CURLEY:

7 Q Mrs. Magda, where do you live?

8 A 2243 Ryer Avenue in the Bronx.

9 Q Are you the mother of the defendant in this case,  
10 Vincent Anthony Magda at this table?

11 A Yes, sir.

12 Q Briefly, bring you and your attention to the  
13 afternoon of September 5th, afternoon or early evening, did  
14 you have a telephone conversation with one of your daughters  
15 concerning your son's arrest?

16 A Yes, sir.

17 Q And after having such a conversation, did you  
18 attempt to reach the patrolman at the police station?

19 A Yes, sir.

20 Q Tell us what happened.

21 A My daughter called me and told me that --

22 MR. EPSTEIN: Objection, your Honor; hearsay.

23 THE COURT: Mrs. Magda, the objection has to be  
24 sustained.

25 THE WITNESS: Yes, sir.

1 gtbr 10

M. Magda-direct

2 THE COURT: I think the question is, did you  
3 call the police station? Did you?

4 THE WITNESS: Yes, sir.

5 THE COURT: Tell us what happened then.

6 THE WITNESS: I called the police station and  
7 an officer answered -- a girl answered and she said yes,  
8 that my son was there.

9 Then she said, "Just a minute," and she would put  
10 an officer on. And a man got on the phone, he said he was  
11 Officer Aleisi, and he told me that he had picked up my son  
12 on 43rd Street by the Port Authority and that he had stopped  
13 him.

14 And I asked him why he stopped him. And he  
15 said because he was talking to another character, but that  
16 other character had ran away but my son hadn't. And he  
17 stopped him. He said, "I searched him," and he said,  
18 "I found a marijuana cigarette."

19 And I said, "A marijuana cigarette"?

20 He said, "Wait, there is more. I also found  
21 a gun."

22 And I said, "A gun?"

23 And he said, "Yes. But don't worry, don't get  
24 excited, it wasn't loaded and he wasn't going to do  
25 anything," he said, "but I had to take him in.. But not to

1 qtbr 11 M. Magda-direct

2 worry, there was nothing --" it was just -- I don't know  
3 the word for it, sir, tha he used, that Vincent hadn't  
4 done anything.

5 Q Do you recall any further conversation between  
6 yourself and the person on the other end of the line during  
7 that conversation?

8           A        No, sir, otherthan he told me that Vincent was  
9                   there in the police station and that he would have to keep him.  
10               but he would -- he would have to brought to court on account  
11               of finding a gun on him.

12 MR. CURLEY: I have nothing further.

13 CROSS EXAMINATION

14 BY MR. EPSTEIN:

15 Q Mrs. Magda, approximately what time did you  
16 call the precinct on September 5th?

17                   A        I am afraid, sir, I won't be able to tell you  
18                   exactly.

19 Q Approximately.

20 A But it was some time 6, 6:30.

21 I wouldn't know, sir, really. It was such  
22 an upsetting time for me.

23 Q And you had a conversation with Officer Aleisi?

24 A Yes, sir. He was a very wonderful man.

25 He told me not to worry. He was a very kind person.

1 qtbr 12 M.Magda-direct

2 Q Mrs. Madga, incidentally, this is not the first  
3 time your son has been arrested, is it?

4 A No, sir.

5 Q He has been arrested on several previous oc-  
6 casions, is that correct?

7 A One that I know of, sir.

10 A "What happened? Why did you -- what happened?"

11                    0        And what did he say in response?

12 A He told me that he had seen Vincent speaking to  
13 another character. This other character had ran away, but Vin-  
14 cent didn't, so he stopped him.

15 O Did he say he had any conversations with your son?

16 A Did he say he had a conversation --

17 Q Did he mention speaking to your son at the time  
18 of the arrest?

19 A That I don't remember, sir. I only remember he  
20 told me that he had stopped him and searched him because  
21 because -- that is when I asked him why, and he said because  
22 he was speaking to somebody and the otherperson had ran  
23 away.

24 THE COURT: Is that exactly what he told you?

25 THE WITNESS: Yes, sir.

1 gtbr 13

M.Magda-direct

2 THE COURT: He was speaking to somebody?

3 THE WITNESS: My son --

4 THE COURT: No. I mean, is that what the  
5 officer said?6 THE WITNESS: The officer said he was speaking  
7 to somebody.8 THE COURT: As far as you can recall, those  
9 are his precise words?10 THE WITNESS: Yes, sir. His precise words were  
11 he saw him speaking to somebody who he -- a character who  
12 he knew was, like, no good.13 Q And what else did he say? He said he found  
14 a marijuana cigarette and what else?

15 A And a gun.

16 Q Did he mention a note?

17 A I don't remember, sir, if he mentioned a note at  
18 that time.

19 Q I am sorry, continue.

20 A Then he told me that they would have to keep  
21 Vincent and I could come down to court, 100 Centre Street,  
22 the following morning and he would meet me there and tell me  
23 everything.24 Q Mrs. Magda, did Officer Aleisi state to you that  
25 as a result of his search of Mr. Magda he had found the

1 gtbr 14 M.Magda-direct

2 cigarette?

3 A Yes, sir.

4 Q He said he found the cigarette after searching  
5 your son?

6 A Yes, sir. He stopped him, he said, and  
7 searched him.

8 Q No, no, that is not my question.

9 A I am sorry, sir. Excuse me.

10 Q My question is whether he stated to you that he  
11 had found the cigarette as a result of searching your son.

12 A Yes, sir.

13 Q Your earlier testimony was that he stated he  
14 found a cigarette and that he searched your son, is that  
15 right?

16 A He stopped him and searched him. That's  
17 exactly what he told me.

18 Q And what else did he tell you about the cigar-  
19 ette?

20 A I said, "A cigarette"?

21 And he said, "Wait, there is more."

22 He said, "We found a gun."

23 And I said, "A gun?"

24 And he said, "Don't worry about it, it wasn't --"

25 Q Mrs. Magda, I am not interested in the gun.

1       gtbr 15                   M.Magda-direct

2           A    I am sorry,sir.

3           Q    I am asking you again, did Officer Aleisi  
4        tell you that he found the cigarette as a result of  
5        serving your son?

6           A    Yes, sir.

7           Q    There is no question in your mind that that  
8        is what he said?

9           A    No, sir.

10           THE COURT:    There is no question in her mind  
11        that that's the impression that she received from the  
12        conversation.

13           Q    Did Officer Aleisi state to you that Mr. Magda  
14        had admitted purchasing a marijuana cigarette?

15           A    Not that I remember, sir.

16           MR. EPSTEIN: Mark this as Exhibit 2, please.

17           (Government's Exhibit 2 was marked for  
18        identification.)

19           Q    Mrs. Magda, this is the affidavit that you  
20        executed, is it not (handing)?

21           A    This?

22           Q    yes.

23           Excuse me. This is a copy of the affidavit  
24        that you executed?

25           A    Yes, sir.

2 Q In this affidavit you make reference to  
3 Officer Aleisi on September 6th, is that correct?

4 A Yes, sir, Saturday morning.

5 Q Can you tell us about that conversation,  
6 please?

7 A Yes, sir.

8 We met him -- he told us to meet him, that  
9 Vincent would be in court at 100 Centre Street and he would  
10 meet us out in front of the courtroom door and tell us every-  
11 thing.

12 We went down there, my daughter and I, and we --

13 Q Which daughter is this, Mrs. Magda?

14 A My other daughter.

15 I have four daughters, sir.

16 Q Could you just tell us her name?

17 A Oh, Patricia Dunbar.

18 Q Continue, please.

19 A I met her -- she came down to my house and  
20 we went down to the court and we waited for a few minutes  
21 and then Officer Aleisi came what you call it, and  
22 he told us the same -- I asked him again, "What happened?"

23 Q What did he tell you?

24 A He said to me he saw Vincent speaking to a colored  
25 man who he knew, he suspected -- in other words, they must

1 gtbr M.Magda-direct 102

2 have -- they knew something about this other character.

3 Q Did he say that to you?

4 A He said he suspected something of the other  
5 character, but he had run away. That's why he stopped  
6 Vince.t

7 And he told me to tell you the truth, he told me  
8 he was very sorry he stopped him and searched him, and I wasn't  
9 to worry because there was nothing to it.

10 Q Mrs. Magda, who was present at this conver-  
11 sation?

12 A My daughter Pat.

13 Q No one else?

14 A My son was there, but he had gone --  
15 my son brought us down, but he had gone out to check on the  
16 car because we had rushed in, we were late to the hearing,  
17 which never took place, incidentally.

18 Q Did Officer Aleisi tell you anything more  
19 about the arrest on that day than he told you on September  
20 5th?

21 A No, sir.

22 Q Because I think you testified earlier that  
23 he was going to tell you all about it, isn't that cor-  
24 rect?

25 A Yes, sir. Yes, sir.

1 gtbr

M. Magda-direct

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2 Q But you have just now testified that he really  
3 didn't tell you anything more than he told you the previous  
4 day?

5 A He just told me that they were going to hold  
6 Vincent, and I would have to come Monday again.

7 Q Mrs. Magda, who prepared this affidavit?

8 A Mr. Curley.

9 Q And did you read it over before you signed it?

10 A Yes, sir. I had to sign it in an office.  
11 I had to go to a man special to sign it.

12 Q Mrs. Magda, you state in this affidavit that you  
13 had a conversation with your son about Officer Aleisi's  
14 testimony in court here.

15 When did that conversation take place?

16 A I did not see my son, sir, no.

17 I had no conversation with my son for -- till the following  
18 Tuesday or Wednesday, when he was already in another -- in a  
19 jail.

20 Q I am sorry. Mrs. Magda, you state in this  
21 affidavit that you had a conversation with your son about  
22 Officer Aleisi's testimony in this court.

23 Did you have such a conversation?

24 A Yes.

25 Q When was that?

2 A The exact date, sir, I don't know.

3 Q Would it refresh your recollection if I told  
4 you this affidavit was executed on December 6th?

5 A Yes.

6 Q When was the conversation with your son?

7 A It had -- if it was on the 6th, then it had to  
8 be a day or two before, because he came home.

9 Q And what did he tell you?

10 A What did he tell me?

11 He said -- wait.

12 I know what he said.

13 He said Officer Aleisi lied. And I said to  
14 him, "Why? What do you mean? Officer Aleisi wouldn't  
15 lie."

16 And he said, "Officer Aleisi lied."

17 And I said, "Officer Aleisi wouldn't lie."

18 And I then -- he told me what happened.

19 He said Aleisi told him -- said that Vincent  
20 had given him something.

21 And I said no. I said, "Officer Aleisi told  
22 me that he had searched you."

23 And then he said to me, "Well, why didn't you  
24 tell me that?"

25 And I said, "Because we never talked it over."

2 This was a terrible thing, you see. They put  
3 him in jail and nobody told me nothing.

4 Q Mrs. Magda, was this the first conversation you  
5 had with your son abou\_ the case?

6 A Actually, no. But about that part, yes.

7 Q Did you have any conversations with him about  
8 the criminal court hearing on November 14th?

9 A Yes, but he told me it wasn't necessary for me to  
10 come.

11 Q Did he tell you anything about Officer Aleisi's  
12 testimony at that hearing?

13 A No.

14 Q He didn't mention to you t hat Officer Aleisi  
15 had lied at that hearing, did he?

16 A No.

17 MR. EPSTEIN: I have nothing further, your Honor.

18 I would offer Exhibit 2 in evidence.

19 THE COURT: Thank you, Mrs. Magda. You may  
20 step down.

xx 21 (Government's Exhibit No. 2 was received in  
22 evidence.)

23 (Witness excused.)

24 THE COURT: Do you have the sister?

25 MR. CURLEY: Yes, your Honor.

1 gtbr

Dunbar-direct

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2 THE COURT: Isn't that going to be merely  
3 cumulative? Is it going to add anything to this?

4 MR.CURLEY: I would submit, your Honor, that  
5 I saved my strongest witness for last. To some extent  
6 it is cumulative, but she apparently played a key role.

7 THE COURT: Call her.

8 MR. CURLEY: Thank you.

9 P A T R I C I A D U N B A R, called as a witness  
10 by the defendant, having been first duly sworn,  
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MR. CURLEY:

14 Q Mrs.Dunbar, where do you live?

15 A 4122 42nd Street, Sunnyside.

16 Q Is that in the Borough of Queens, City of  
17 New York?

18 A That is right.

19 Q And are you the sister of the defendant in this  
20 case, Vincent Anthony Magda?

21 A Yes, I am.

22 Q And drawing your attention to the events on the  
23 afternoon and early evening of September 5th, 1975, Mrs.  
24 Dunbar, did there come a time when you received a telephone  
25 call from your sister, Mrs. Lees?

3 Q And just answer yes or no.

6 A Yes.

7 Q And did you call anybody at that precinct house?

8 A Yes, I did.

9 Q Tell us in your own words what happened from the  
10 time you received a response at the other end of the tele-  
11 phone.

12                   A        Well, my sister told me the precinct that he  
13                    was --

14 C Excuse me. I am skipping over there.

15 I want to go directly to the call that you made to the  
16 precinct house.

17           A        Well, I called and I asked to speak to Officer  
18                    Aleisi because she told me that was the officer who  
19                    arrested him.

20 And he came on the phone and he said, "Who is  
21 this?"

22 I said, "This is Patricia."

23 He said, "Oh, another sister."

24 And he was very nice.

25 I asked him what had happened and he --

1 gtbr

2 Q Let me interrupt.

3 Did he identify himself?

4 A Did he identify himself? Yes.

5 Q What did he say to identify himself?

6 A That this is officer Aleisi

7 Q Continue.

8 A Yes.

9 And I said I was calling about Vincent  
10 Magda, my brother.11 A And he said, "Your brother is sitting right  
12 here, and don't get excited. It is nothing."

13 I said, "Well, what happened?"

14 He said, "He wasn't doing anything."

15 Do you want me to continue?

16 Q Yes. The entire conversation with the patrol-  
17 man.

18 A And so I said, "Well, what happened?"

19 He said that he was on 43rd Street and 8th  
20 Avenue and he saw him talking to this other fellow, a black  
21 fellow I think he said, and he said that he saw some  
22 transaction going on between the two of them, it looked  
23 like they transferred something back and forth, and when he  
24 approached them the other guy ran away, which made him more  
25 suspicious, and he stopped my brother. And he said when he

1 gtbr

Dunbar-direct

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2 searched him he found a joint and an unloaded gun.

3 When I made comment, "Well, what was he doing with  
4 the gun?"5 He said, like, it wasn't loaded and not to be  
6 excited and that we could -- he was going to be arraigned the  
7 next morning at Centere Street at 9 o'clock in the morning.  
8 He said notto wrroy about it.

9 He was, you know, and other things.

10 Q Drawing your attention specifically to that part  
11 of his conversation d:alint with the time or sequence of  
12 events as to the stopping and the obtaining of the joint,  
13 what was said between you at that time?

14 A I don't understand what you mean.

15 Q Would you tell us the conversation by telephone  
16 between you and Patrolman Aleisi in which he said that he  
17 obtained something from your brother, namely, that joint of  
18 marijuana cigarette.19 A Yeah, he found the joint on him when he searched  
20 him and he found the gun and he arrested him.

21 You want the rest of it?

22 And he told me that Vincent was a nice guy and  
23 that he -- he got a long goodwith him and that he wouldn't  
24 have arrested him just for having one joint, but he also  
25 had the gun and he had to take him in.

1 gtbr

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2 Q Is it your testimony and your recollection of  
3 the conversation with Patrolman Aleisi that he arrested  
4 your brother after taking the marijuana cigarette from him?

5 A And the gun, yes.

6 Q Did Patrolman Aleisi ever tell you that your  
7 brother had volunteered or your brother himself had taken  
8 out the marijuana cigarette and handed it to Patrolman  
9 Alei i?

10 A No, no.

11 Q There is no question in your mind as to the  
12 conversation with Patrolman Aleisi on that point?

13 A No.

14 Q Did there come a time later on that evening  
15 in which you had a second conversation with Patrolman  
16 Aleisi?

17 A Yes.

18 Q Don't shake your head, please answer.

19 A Yes.

20 Q Was that a conversation in which you again  
21 called the precinct house?

22 A Yes, I did.

23 Q Tell us about that.

24 A When my sister called me back and she said that  
25 now --

2           Q     Excuse me.  We have been told there are four  
3     sisters.  Which sister are you referring to?

4           A     Virginia.  My sister Virginia called me back  
5     and she said that there was a note involved.

6                   And I said, "Well, I just talked to the police-  
7     man and he only said that there was the marijuana cigarette,  
8     a joint,"as he put it,"and the gun."

9                   So I called again and I asked to talk to Officer  
10    Aleisi.  And he was very friendly and he said,  
11    "Well, hello again."

12                  And I said, "I understand that there is a note,  
13    and what kind of a note?"

14                  He said, well, a note that might be used in a  
15    robbery or whatever, you know.  I didn't mention the fact  
16    that he hadn't mentioned it to me earlier.  Just now, now  
17    there was the note and the gun and the marijuana cigarette  
18    and he -- and he said, well, he knew that we were upset  
19    and he said he had talked to my mother and my other sister  
20    Virginia and that he would be at 100 Centre Street and he  
21    would meet us there, we would look for him.  He would  
22    talk to us before Vincent was arraigned.

23                  Q     During that second telephone conversation  
24    between yourself and Patrolman Aleisi, Mrs. Dunbar,  
25    was there any discussion concerning those specific facts

1 gtbr

Dunbar-direct

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2 having to do with how Patrolman Aleisi stopped and  
3 arrested your brother?

4 A The second conversation?

5 Q Yes.

6 A I am really not sure.

7 Q Did you go to the criminal court building at  
8 100 Centre Street the following morning?

9 A Yes, I did.

10 Q And who was with you?

11 A My husband and my mother.

12 Q And did there come a time when you had a conver-  
13 sation with Patrolman Aleisi?

14 A Yes.

15 Q Who was present at that time?

16 A My mother and I were present, like, together  
17 and my husband was sort of -- you know, he didn't get in-  
18 volved in the conversation. Mr. Aleisi, my mother and myself  
19 were in a conversation.

20 Q Are you finished?

21 A Yes.

22 Q What was said amongst the three of you,  
23 Patrolman Aleisi, your mother and yourself, at that time  
24 concerning the events were are discussing?

25 A Well, basically the same thing that was said

1                   gtbr  
2                   to me on the phone, because, you see, my mother was upset  
3                   and she kept asking him if he didn't do anything why did  
4                   you arrest him. She kept saying that over and over  
5                   again.

6                   So he said, look, when he found the joint -- he  
7                   said the same thing. "I wouldn't have taken the guy in  
8                   for having one joint, but he had the gun on him," you  
9                   know, and he said, like, he was more or less sorry to incon-  
10                  venience such a nice family. And he was really a very decent  
11                  copy, a very nice person.

12                  Q           Can you recall whether he actually said he found  
13                  the joint on your brother or is that your recollection  
14                  of it?

15                  A           Yes, he did say that. No, he actually said that  
16                  to me.

17                  He said when he searched him he found it.

18                  Q           Did there come a time when you learned that  
19                  Patrolman Aleisi had testified before Judge Carter in  
20                  reference to this case?

21                  A           Yes.

22                  Q           And did you learn that Patrolman Aleisi had  
23                  testified that your brother had turned over the marijuana  
24                  cigarette to him?

25                  A           Yes.

2 Q And as a result of that knowledge, did you have  
3 telephone conversations with your mother and your sister,  
4 your sister Virginia Lees?

5 A After I spoke to you, you told me to call my sis-  
6 ter and ask her what she remember, which I did, and I swear  
7 again on the bible what I did to make sure that I was doing  
8 it right, I called my sister -- after my brother said --  
9 he got a little upset.

10 Q When you say "he," who do you mean?

11 A Vincent got upset.

12 We were in a conversation and he just doesn't  
13 talk about what's going on and my mother had asked me to  
14 try to talk to my brother to see what's happening with all  
15 the court, so he happened to mentioned to me what Officer  
16 Aleisi said, and all I said to him was, "Well, that's not  
17 what he said to me."

18 Vincent asked me, "What did he say to you?"

19 I told him.

20 He says, "Why are you telling me now?

21 It is too late."

22 I said no one asked me and I didn't think it  
23 was important what a policeman had said to me months ago.

24 He said to me, "Youcall Mr. Curley," and I did.

25 When I called you and I told you, you said,

2 "Did you talk to your mother and sister yet?"

3 I said, "No, I didn't have a chance because  
4 Vincent told me to talk to you."5 And I called my sister, and all I said to her on  
6 the phone was, "Virginia, just tell me, do you remember the  
7 night that we talked to Officer Aleisi when Vincent was  
8 arrested? Tell me what he said to you."9 And she repeated it back to me, you know, and  
10 her reaction was like mine, what he said. He said that he  
11 searched him and found it.12 I said, "Now I want you to call Mr. Curley at  
13 his office and tell him that."14 Q Did you also have a conversation along similar  
15 lines with your mother?

16 A Yes.

17 Q And did you prepare an affidavit for the  
18 court proceeding?

19 A Yes, I did.

20 Q Before preparing that, were you given a form  
21 or the substance of a form through your brother Vincent?22 A Well, I wanted to put it into my own words, you  
23 know, and have it notarized, but Vincent said that you  
24 had wanted it more to read legally, you know, that it  
25 should read in a legal term and that we would fill in in

2

3 Q Yes, my brother read it to me over the tele-  
4 phone, and then I signed it and had it notarized and I  
5 put in what I am saying here today.

6 MR. CURLEY: No further questions.

7 MR. EPSTEIN: Mark this as Exhibit 3, please.

xx

8 (Government's Exhibit No. 3 was marked for  
9 identification.)

10 CROSS EXAMINATION

11 BY MR. EPSTEIN:

12 Q Mrs. Dunbar, this is your affidavit, isn't it  
13 (handing)?

14 A Yes.

15 Q Could you tell us what part you filled in in  
16 your own words in that affidavit?

17 A Okay.

18 After "To the best of my recollection, the  
19 time, place, circumstances was as follows:"

20 The rest is mine.

21 This is what I said.

22 "I telephoned the station house where my  
23 brother was being held. I was told Patrolman Aleisi was  
24 the arresting officer. I spoke with Patrolman Aleisi.  
25 I spoke with him again about one hour later. At Patrolman

2 Aleisi's request I met and spoke with him on September 8th,  
3 1975 outside a courtroom at 100 Centre Street."

4 Those are my words.

5 Q And all the rest was given to you?

6 A Yes.

7 Q It is your testimony that what you filled in was  
8 an accurate account of what happened?

9 A Yes.

10 Q You testified here, of course, that you met  
11 with Patrolman Aleisi on September 8th?

12 A Well, I am not sure of the date, really.

13 You know, the dates -- September the 6th?

14 Q You stated in your affidavit that you met with  
15 Patrolman Aleisi on September 8th and you stated here  
16 that you met with him on September 6th.

17 Now, which was it?

18 A It was the next morning, Saturday morning.

19 Q September 6th?

20 A Yes.

21 Q Therefore, you never met with him on  
22 September 8th?

23 A No.

24 Q So the affidavit is false in that regard?

25 A I made a mistake in the date.

2 THE COURT: Come on, Mr. Epstein.

3 Q You were just mistaken, is that correct?

4 THE COURT: It is the same thing. She met him  
5 outside the courtroom. That is what themother testified.  
6 Whether it is the 8th or the 6th --

7 Q You were not present in court on the 8th,  
8 is that correct?

9 A No.

10 Q Mrs.Dunbar, when were you called on September 5th  
11 about Mr. Magda's arrest?

12 A When was I called?

13 Q Yes. When were you first called?

14 A By my sister.

15 Q When?

16 A The day that he was arrested, on a Friday.

17 Q What time on that day?

18 A About dinner time.

19 Q And what time did you call the precinct?

20 A A little while later.

21 Q How long was your conversation with Officer  
22 Aleisi?

23 A How long?

24 Q Yes.

25 A Four minutes, maybe.

2 Q How long was your second conversation with  
3 Officer Aleisi?

4 A About the same.

5 Q On how many occasions have you discussed your  
6 testimony here with Mr. Magda?

7 A What I am saying her- coday?

8 Q Yes.

9 A Just when I was telling him what was happening,  
10 because he refused to let me discuss this with him, my  
11 mother or my sister.

12 Q And you h-ve discussed the testimony with your  
13 sister and your mother, is that correct?

14 A Have I?

15 No, I have not. Only on the day when I asked  
16 her did she remember what happened and on the day that  
17 I asked my mother if she remembered what happened.

18 We haven't discussed among ourselves.

19 Q That was the only time that you discussed the  
20 events in question, is that correct?

21 A Yes, yes.

22 Q And you haven't discussed it with them subse-  
23 quently?

24 A You mean just in -- you mean what we are going  
25 to say here today or if we remember what happened?

1 gtbr

Dunbar-cross-redirect

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2 I may have once or twice, like, mentioned to  
3 her, because we did have to come to court, you know,  
4 things like that and how she was going to get here and  
5 things like that pertaining to today. But we did not  
6 discuss what we were going to say, no.

7 MR. EPSTEIN: I would offer Exhibit 3.

8 I have nothing further.

xx 9 (Government's Exhibit No. 3 was received in  
10 evidence.)

11 THE COURT Thank you very much.

12 Is that all?

13 MR. CURLEY: I have one question which I think  
14 might be relevant.

15 REDIRECT EXAMINATION

16 BY MR. CURLEY

17 Q In reference to the last series of questions  
18 by Mr. Epstein, Mrs. Dunbar, conversations between you and  
19 other members of the family, did you have sort of a roundtable  
20 discussion with your sister, your mother, your brother and  
21 myself --

22 A Yes, I did.

23 Q -- on Friday, when the court session here  
24 was scheduled?

25 A Yes.

2 MR. CURLEY: Thank you.

3 THE COURT: All right.

4 (Witness excused.)

5 THE COURT Anything else, Mr. Curley?

6 MR. CURLEY: No, your Honor.

7 THE COURT: All right.

8 Mr. Epstein, do you have anything?

9 MR. EPSTEIN: Yes. Officer Aleisi.

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1 B1 1 gtjb 1 Aleisi-direct 122

2 XXX 2 S A V A R I O A L E I S I, called as a witness by

3 the Government, having first been duly sworn, testi-

4 fied as follows:

5 XXX DIRECT EXAMINATION

6 BY MR. EPSTEIN:

7 Q Officer Aleisi, you previously testified that

8 you arrested Vincent Magda on September 5th, is that correct?

9 A Yes.

10 Q And after the arrest, did there come a time

11 when you took him to the precinct house?

12 A Yes.

13 Q And did there come a time that you received a

14 phone call from someone identifying herself as Mr. Magda's

15 sister?

16 A Yes.

17 Q Do you recall her name?

18 A No.

19 Q What, if anything, did she say to you and you

20 to her?

21 A She had asked me about her brother, and I told

22 her I had arrested him. And she asked me what for, and I

23 told her for possession of a controlled substance, mari-

24 juana cigarette.

25 I think that was all in that conversation, I

1 gtjb 2

Aleisi-direct

123

2 think.

3 Q Did you have a subsequent conversation with this  
4 sister or other sisters?

5 A Yes, I did.

6 Q Will you tell us about those, please?

7 A I think I got another call that night I think  
8 from his sister, I don't know if it was the same one, and  
9 that was later on, and by that time some Federal people had  
10 come down and something about that he was--something to do  
11 with a bank robbery.12 So when I spoke to them on the phone again I  
13 told them that, that they were down there and they were  
14 questioning him about something to do with bank robbery.15 Q Directing your attention again to the first  
16 conversation, do you recall anything else that you said to  
17 this sister during the first conversation?18 A Just that I would be down at the stationhouse  
19 with him and just that he would be with me in a police sta-  
20 tion, you know, stuff like that.21 Q Did you tell her anything further about the  
22 circumstances of the arrest?

23 A Yes, I did.

24 Q What did you say at that time?

25 A I told them that I got him--picked him up around

1 gtjb 3

2 43rd Street and Eighth Avenue for buying a marijuana cigar-  
3 ette and that's what I locked him up for.

4 Q Did you go into any greater detail--

5 MR. CURLEY: Excuse me. I'm sorry. May I have  
6 that answer read back?

7 (Record read.)

8 Q Did you go into any greater detail about the  
9 circumstances of the arrest?

10 A Not that I recall.

11 Q Did you ever tell her that you had found a  
12 marijuana cigarette on Mr. Magda's person?

13 A Not that I recall, no.

14 Q Did you ever tell the sister who called that  
15 night that you had found this cigarette pursuant to a  
16 search of Mr. Magda's person?

17 A No.

18 Q You are sure about that?

19 A Yes.

20 Q I direct your attention to September 6th, the  
21 following day.

22 Were you on duty at that time?

23 A Yes.

24 Q Were you at 100 Centre Street that morning for  
25 an arraignment?

2 A Yes.

3 Q Did there come a time when you had a conversa-  
4 tion with members of Mr. Magda's family?

5 A Yes.

6 Q Who do you recall was present at that time?

7 A His mother and I think it was his brother-in-  
8 law.

9 Q Do you recall anyone else being present?

10 A No.

11 Q What was the substance of that conversation,  
12 please?13 A To the best of my recollection, they asked me  
14 what was going on, and I told them that he would be  
15 arraigned and that bail would be set. I don't know, you  
16 know--what would happen after that I didn't know.

17 Q Where did you have this conversation?

18 A In the hallway outside the complaint room.

19 Q Did they ask you again why you had arrested Mr.  
20 Magda or how you had arrested him?

21 A Just--they asked me the charges, yes.

22 Q And what did you say in response?

23 A I told them I had arrested him for possession  
24 of a marijuana cigarette, but that the Federal people were  
25 involved in it because they have something on a bank rob-

1 gtjb 5

Aleisi-direct

2 bery on him which I know nothing about.

3 Q Did you ever state that you found the mari-  
4 juana cigarette on his person pursuant to a search?

5 A No.

6 Q Are you sure about that?

7 A I don't recall that, if I--what I said to them  
8 and how I found it. I don't recall. I just told them I  
9 locked him up for possession of a marijuana cigarette.10 Q But whether or not you ever discussed it, do  
11 you ever recall telling them that you found the marijuana  
12 cigarette pursuant to a search?13 A No, no, I never told them that. I never said  
14 that to them.15 Q Officer Aleisi, could you describe once again  
16 very briefly how you came upon the marijuana cigarette on  
17 September 5th?18 A The marijuana cigarette was produced to me by  
19 the defendant. He took it out of his pocket and showed it  
20 to me and said that he had bought it. He told me that.21 Q Is there any question in your mind but that  
22 that's what happened?

23 A None at all.

24 Q Is there any possibility that you searched his  
25 person and found the cigarette pursuant to a search?

2 A None at all.

3 Q I show you what has previously been marked as  
4 Exhibit 4 for identification, and I ask if you can identify  
5 that (handing).

6 A It's my memo book from August 17th to September  
7 22, 1975.

8 Q Directing your attention particularly to pages  
9 9 through 11 of Government's 4 for identification, can you  
10 tell us what those pages represent?

11 A It's my memo entries for tour of September 5,  
12 1975 for an eight to four tour that day.

13 Q Can you tell us what your practice is in keep-  
14 ing a memo book?

15 A I write my assignments in the book and any  
16 official business that I come in contact with I keep notes  
17 on which are required by the rules and procedures in my  
18 department.

19 Q The entries on pages 9 through 11, when were  
20 they made?

21 A As the day went along. I usually make an entry  
22 right after I have to.

23 Q When were the entries for September 5th made,  
24 if you recall?

25 A All of the entries are one.

2 The first entry would be the roll call in the  
3 morning at 7:45. That would probably be my first entry.

4 Q I specifically direct your attention to the  
5 entries on pages 10 and 11 concerning the arrest.

6 A Can I see, please?

7 Q Yes (handing).

8 A Well, the 1500 entry about the arrest probably  
9 was made in the stationhouse about a half hour later, after  
10 I had gotten into the stationhouse.

11 Q There is no question in your mind it was made  
12 on September 5th, is that correct?

13 A None, no.

14 Q Officer Aleisi, is this memo book made in the  
15 regular course of business?

16 A Yes.

17 Q And is it the regular course of your business  
18 to keep such a memo book?

19 A Yes.

20 MR. EPSTEIN: Your Honor, I would offer it.

21 MR. CURLEY: I have no objection.

XXX 22 (Government Exhibit No. 4 was received in  
23 evidence.)

24 MR. EPSTEIN: Your Honor, may I read a portion  
25 of it into evidence now?

2 THE COURT: Yes.

3 MR. EPSTEIN: May I ask Officer Aleisi to read  
4 it, because I am not entirely sure I can read his hand-  
5 writing.6 Q Officer Aleisi, I am directing your attention  
7 to page 10 of Government Exhibit 4 in evidence, the entry  
8 marked 1500.9 Could you please read that answer "Observed one  
10 male white making buy from one male black at 43rd Street  
11 and Eighth Avenue, stopped male white, admitted he bought  
12 one marijuana cigarette for \$1.13 "Upon arresting and searching found 9 milli-  
14 meter Browning automatic unloaded and note saying 'This is  
15 a robbery.'16 "Arrest number 19498, UF 61, number 25500. FBI  
17 Agent Mitchell present and took possession of note and  
18 key for locker.19 "Voucher number 832155 for the cigarette,  
20 832157 for the gun, note voucher 832158."21 MR. EPSTEIN: I have no further questions, your  
22 Honor.

23 CROSS EXAMINATION

XXX 24 BY MR. CURLEY:

25 Q Patrolman Aleisi, at the time you made the

2 observations between Mr. Magda, then unknown, and the un-  
3 known black male, you didn't know what they were doing,  
4 is that correct?

5 MR. EPSTEIN: Objection, your Honor.

6 THE COURT: We really aren't going into that  
7 again, are we?

8 The only thing we are going into--we went into  
9 that before. I am not reopening this.

10 MR. CURLEY: It just concerns this last exhibit,  
11 your Honor, concerning--

12 THE COURT: Yes. But it has nothing to do with  
13 that.

14 You may inquire about the entry and so forth,  
15 but we went through all that at the other hearing.

16 Q Would it be fair to say, Patrolman Aleisi, you  
17 made the entry after you had a time to analyze the sequence  
18 of events that had occurred earlier on 43rd Street and  
19 Eighth Avenue?

20 A Yes.

21 Q And in your report you put in your analysis of  
22 what had taken place?

23 MR. EPSTEIN: Objection, your Honor. It calls  
24 for a conclusion.

25 THE WITNESS: It obviously does that, but how

2 else can he answer any question?

3 I don't think it is going to help me, because  
4 I don't know what you mean.5 Q You say that you observed a male white making  
6 a buy from a male black, is that correct?

7 A Yes.

8 Q In other words, meaning to you that he had pur-  
9 chased contraband, a controlled substance?

10 A Yes.

11 Q And you recall testifying on the 26th that I  
12 asked you as Mr. Magda was walking south toward 42nd Street  
13 if you would have stopped him or arrested him if you hadn't  
14 observed--withdrawn--if you hadn't observed and followed  
15 your direction to stop?16 MR. EPSTEIN: Objection, your Honor. I think  
17 this is beyond the scope of this hearing.

18 THE COURT: Objection sustained.

19 Q Is it your testimony, Patrolman Aleisi, that  
20 you would have to let him continue because you were not  
21 aware of any possible charge that you could have made against  
22 him?

23 MR. EPSTEIN: Objection.

24 THE COURT: Sustained.

25 Q Do you recall testifying on that point on the

1 gtjb 11

Aleisi-cross

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2 26th of November before his Honor, Patrolman Aleisi?

3 MR. EPSTEIN: Objection, your Honor.

4 THE COURT: Sustained.

5 Q Isn't it a fact, Patrolman Aleisi, that at the  
6 time you spoke with Mr. Magda, which was after you made  
7 the observations reflected in your memo book, you were not  
8 aware of any charge for which he could be arrested?9 MR. EPSTEIN: What time is being specified here,  
10 your Honor?

11 THE COURT: Read the question back, please.

12 I don't understand the question. I don't think  
13 I'm clear on it.

14 (Record read.)

15 A I was aware. I had a reason--I had reasonable  
16 cause to believe something transpired.17 Q That is, when you stopped him as he was walking  
18 south from 43rd to 42nd on Eighth, you had a reasonable  
19 cause as to what--

20 MR. EPSTEIN: Objection, your Honor.

21 THE COURT: I am not going to go into that.

22 I think the question that you are addressing  
23 yourself to is the statements that he made in the entry and  
24 I am willing for you to ask on what basis he made those  
25 entries if you want to do that. But we are not going

1 gtjb 12

Aleisi-cross

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2 through this again, Mr. Curley. We devoted a full day to  
3 this, or several hours, at least, on November 26th.

4 MR. CURLEY: I think I can cover it in argument,  
5 your Honor. I won't pursue it any further.

6 THE COURT: All right.

7 Let me ask: What was the basis on which that  
8 entry that you made--let me see it.

9 (Handing to the Court.)

10 THE COURT: I can't read it myself.

11 (Pause.)

12 THE COURT: You said--I think I can read it now  
13 --"observed one male white making buy from one male black  
14 at 43rd Street and Eighth Avenue, stopped male white, ad-  
15 mitted he bought one marijuana cigarette for a dollar."

16 What was the basis upon which you made that  
17 entry?

18 THE WITNESS: On my arrest of Mr. Magda after  
19 I had--

20 THE COURT: I know. But tell me the circum-  
21 stances that led you to make the entry in that way.

22 You made this entry after--

23 THE WITNESS: After, in the stationhouse, yes.

24 THE COURT: What do you mean "admitted"? What  
25 do you mean by that?

1 gtjb 13

Aleisi-cross

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2 THE WITNESS: I had asked him what he had done  
3 and he said he bought one marijuana cigarette for a dollar.

4 THE COURT: I see.

5 You are saying when you approached him the first  
6 time?

7 THE WITNESS: Right.

8 THE COURT: He said, "I bought the cigarette  
9 for a dollar"?

10 THE WITNESS: Right, which was in my arrest  
11 report.

12 THE COURT: All right.

13 All right, Mr. Curley.

14 Q And your arrest report was made up at the pre-  
15 cinct house?

16 A Yes.

17 THE COURT: Yes. We know that.

18 Q Patrolman Aleisi, you testified that there were  
19 two telephone calls made to you at the precinct house  
20 while you were in the company of Mr. Magda after having  
21 arrested him on 43rd Street, is that correct?

22 A Yes.

23 Q And you are not sure whether--withdrawn.

24 And the party calling each time was a woman?

25 A Yes.

1 gtjb 14

Aleisi-cross

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2 Q And identified herself as the sister of the  
3 defendant?

4 A Yes.

5 Q And you are not sure whether or not the two  
6 telephone calls were from the same woman?

7 A Yes. I'm not sure if it was the same sister  
8 calling twice or a different sister each call.

9 THE COURT: But you only recall two calls?

10 THE WITNESS: That's all I recall, yes, to the  
11 phone twice.

12 THE COURT: Not five calls?

13 THE WITNESS: No, no.

14 Q There is no question that you spoke to Mrs.  
15 Magda, the defendant's mother, outside one of the court-  
16 rooms or in the lobby of 100 Centre Street the following  
17 morning?

18 A The mother?

19 Q The mother.

20 A Yes, I spoke to the mother, yes.

21 Q And it is your testimony that you never spoke  
22 with her by telephone the previous late afternoon or evening?

23 A I don't recall if I did. I spoke to a couple  
24 of women and I think they said that they were his sisters.

25 Q Your answer is you don't recall?

2 A I don't recall if one of them was his mother.  
3 I spoke to a couple of females on the phone and I think they  
4 stated that they were his sisters.

5 Q Do you recall whether any of them indicated that  
6 they were calling you back because they had learned that in  
7 addition to the initial information concerning the arrest,  
8 that a note, meaning an additional charge, had been found on  
9 Vincent Anthony Magda?

10 A They called me back that night. Like I said,  
11 I got a couple of calls that night from them.

12 Q Do you recall whether the substance of one of  
13 the calls being that the party calling you had recently  
14 learned that in addition to the marijuana cigarette and the  
15 unloaded revolver, there was an additional matter concerning  
16 the discovery of a note?

17 A I spoke to them about that, yes.

18 Q Do you recall whether or not this was the same  
19 person that you had spoken to earlier?

20 A I don't recall, no.

21 Q Did you inquire how the person making this  
22 second call had learned about the note?

23 A No.

24 Q Did you tell the first person that you had found  
25 a note?

2 A Yes.

3 Q Patrolman Aleisi, was Agent Mitchell of the FBI  
4 present when you made the entry in the memo book?

5 A I don't think so.

6 Q Did you first meet Agent Mitchell before or  
7 after making the entry?

8 A I think he showed up after the entry.

9 Q Can you tell us how you make reference to Agent  
10 Mitchell in the entry?

11 A I received a phone call from a--I called.

12 I had to call our major case squad. I was  
13 directed by my desk officer to call up the major case squad  
14 and let them know about this note and the gun, which I did.15 I think through them, they contacted the FBI,  
16 and through that I was in contact with the FBI office who  
17 told me that there would be a couple of agents who would  
18 come down and talk to the defendant.

19 Q And this is within a half hour of the arrest on--

20 A This is a half hour, 38 minutes, 45 minutes, in  
21 that proximity. I don't know exactly.22 I was very busy going about my official business  
23 of making my arrest report and the related forms that go  
24 with it.

25 Q Can you tell us how you put the word or the

1 gtjb 17

Aleisi-cross

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2 phrase "FBI Agent Mitchell present" at the time you made  
3 the entry?

4 A Apparently he was there.

5 Q Is that your testimony now, that he was there  
6 at the time you made the entry?

7 A He must have been if it says in my book he was  
8 present. He must have been on the scene.

9 Q Was he there within a half hour or 38 minutes  
10 after the arrest of Vincent Anthony Magda on 43rd Street  
11 and Eighth Avenue?

12 A Approximately.

13 I knew he was coming. I knew he would be there  
14 or he was there.

15 Q You knew someone was coming from the FBI, is  
16 that correct?

17 A That's what I was told.

18 Q And where is the precinct located?

19 A 357 West 35th Street.

20 Q And do you know where the FBI Headquarters is?

21 A No.

22 Q Do you know whether or not they have head-  
23 quarters in New York City?

24 A No.

25 Q Have you ever heard of the address 201 East

1 gtjb 18

Aleisi-cross

139

2 69th Street?

3 A No.

4 Q Did you ever have reference to the FBI in your  
5 transaction as a police officer?6 THE WITNESS: I don't know where all this is  
7 leading us to, Mr. Curley.8 Q Do you know how to contact the FBI, Patrolman  
9 Aleisi, should you want their assistance?

10 THE COURT: No, I'm not going to allow that.

11 What difference does it make? It doesn't seem  
12 to me to have any relevance to the problem that I have.13 MR. CURLEY: Your Honor, this is offered to  
14 substantiate the defendant's contention that this entry  
15 made in the memo book was made long after the incidents  
16 in question and not within a half hour or 38 minutes as  
17 the Patrolman has testified, and since the Government in  
18 its pre-trial memo has already indicated that the Officer's  
19 credibility is crucial, I think it is relevant on that  
20 point, and that is the only point for which it is being  
21 offered.22 THE COURT: It is not going to be very helpful  
23 to me.24 I think the only thing that is before me is  
25 whether circumstances pursuant to which whether or not

1 gtjb 19

Aleisi-cross

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2 Officer Aleisi had sufficient probable cause to stop and  
3 arrest this man. That is the issue.

4 MR. CURLEY: I have no more questions along this  
5 area, then, your Honor.

6 MR. EPSTEIN: Nothing on redirect.

7 THE COURT: All right. Thank you.

8 (Witness excused.)

9 THE COURT: All right. Thank you, ladies and  
10 gentlemen.

11 Are you filing a memorandum in this case?

12 MR. CURLEY: Yes, your Honor.

13 THE COURT: We set a time for that, haven't we?

14 MR. CURLEY: Your Honor, I believe there was  
15 an understanding that approximately a week after receiving  
16 the minutes.

17 I believe I wrote him my letter that one of the  
18 Court Reporters had taken some minutes home and then was  
19 ill, and the first I learned that the minutes were avail-  
20 able is when the Government cited them in their memo.

21 I have since received a photostat, I think, of  
22 the Clerk's copy.

23 My brief is almost finished, but I am just  
24 wondering if we should make reference in it to today's  
25 activities, which would be required in any event for future

1 gtjb 20

Aleisi-cross

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2 proceedings.

3 THE COURT: All right. Thank you.

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Mr Epstein A 147 - Rm 823

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA,

- against -

75-3046

VINCENT ANTHONY MAGDA,

Defendant.

----- x  
A P P E A R A N C E S:

Hon. Thomas J. Cahill  
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Southern District of New York  
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CARTER, District Judge

O P I N I O N

On the afternoon of September 5, 1975, New York City Patrolman Saverio Alesi arrested the defendant, Vincent Anthony Magda, for possession of a marijuana cigarette. At the time of his arrest Magda also had on his person an unloaded 9mm. Browning automatic revolver and a "demand note," the text of which is set out in the margin. 1/ Handwriting analysis of the note linked Magda to the robbery of the United Mutual Savings Bank, 20 Union Square, New York City, for which he was indicted on September 25, 1975 (75 C 942), 2/ and

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1/  
"THIS IS A ROBBERY. KEEP YOUR HANDS WHERE I CAN SEE THEM AT ALL TIMES. THERE IS TWO OF US SO DO AS YOU ARE TOLD AND NO ONE GETS HURT. PUT ALL YOUR 50's AND 100's INTO THE ENVELOPE AND HAND IT BACK."

2/

Magda was charged in two counts with violating Title 18, U.S.C. §§2113(a) and (d) by robbing a federally insured bank by force, violence and intimidation and by committing assault during that robbery.

apparently pointed to his involvement in bank robberies in Chicago, Washington, Miami and New Orleans. Subsequently, additional evidence was uncovered by the Federal Bureau of Investigation that might provide additional links to defendant's involvement in the New York bank robbery.

Defendant moves to suppress the demand note, statements made by him after his arrest, and any other fruits of the search in which the note was found. If evidence of the crime was improperly obtained, it cannot be used against the defendant at trial. Weeks v. United States, 232 U.S. 383, 393 (1914). The government concedes that before the demand note was found, Magda had not been suspected of committing any of the crimes with which he is now charged and that if the search was unlawful, all the evidence against Magda is tainted and cannot be used against the defendant. This seems to be true of the evidence in respect of the various other bank robberies as well, but obviously that is beyond the scope of my inquiry. See generally, Wong Sun v. United States, 371 U.S. 471 (1963).

A hearing was held on defendant's suppression motion on November 26, 1975. Alesi and the defendant testified. On December 15, 1975, the hearing was reopened at the defendant's request. At the later hearing, the

defendant's mother, Mrs. Margaret Magda, two of his sisters, Mrs. Virginia Lees and Mrs. Patricia Dunbar, testified and the police officer was recalled for additional testimony. The hearings produced sharply differing accounts of some details of the arrest. I believe Alesi's version of the events more exactly accords with what took place. However, even accepting the police officer's testimony as the basis for my determination, I am compelled to conclude that the motion to suppress must be granted.

#### Background Facts

On September 5, 1975, Alesi, an eleven-year veteran of the New York City Police Department, was on foot patrol on Eighth Avenue between 42nd and 45th Streets. He described the area as a "narcotics prone location." When Alesi first noticed Magda, the defendant was on the north side of 43rd Street, about fifteen to twenty feet from the northwest corner and approximately thirty to thirty-five feet away from Alesi who was standing on the southwest corner of Eighth Avenue and 43rd Street. Alesi testified that the defendant, who is white, was speaking to a "young, "male black" with whom he exchanged something. Each man gave and received something simultaneously, but Alesi could not see what changed hands. After the exchange, the black man looked

up in Alesi's direction, turned around in a "rapid motion" and proceeded to walk westbound down 43rd Street away from Alesi in the direction of Ninth Avenue. Magda then turned toward Alesi, crossed 43rd Street at an angle heading down Eighth Avenue toward 42nd Street and passed the officer. As Magda walked past, Alesi tapped the defendant on the shoulder and asked him to stop. Magda turned to face Alesi and slowed his pace but continued down Eighth Avenue, walking backwards. Alesi walked with him for several steps covering perhaps ten feet before they both stopped.

*PL*  
~~PL~~  
Alesi asked the defendant what had transpired between him and the black man. Magda at first said nothing had happened; but when asked again, he replied, "All right. I bought a marijuana cigarette for a dollar," and produced the cigarette from his inside coat pocket.

Alesi then placed the defendant under arrest and walked him back up to 43rd Street in a vain attempt to find the other man. Alesi searched the defendant, discovered the gun and the note, and took him to the police station where he was booked and locked up.

Although Alesi has been on the police force for eleven years, at the time of this incident, he had

been on foot patrol in the midtown area for approximately six months. He had observed two street arrests for narcotics by other police officers on that street and he himself had previously made street arrests for narcotics, but not in that area. When asked to describe the extent of his knowledge of narcotics activities in the area, Alesi referred to maps and graphs in the muster room at the Midtown South Precinct, but expressed no additional personal experience. Alesi also explained that McCaffrey Park is a center of much of the drug traffic in the Forty-Third Street area. The park is roughly in the middle of the block between Eighth and Ninth Avenues--100 to 125 feet from where the exchange between the defendant and the black man took place.

*Prob. 1/2*

When asked by the court what it was about the transaction between Magda and the black man that caused him to stop the defendant, Alesi answered: "At the location. And when the male black exchanged something and he seen me, he turned in a rapid motion and proceeded westbound ... on 43rd Street." (Transcript at 41.) Apparently Alesi had never seen the black man or the defendant before and possessed no independent knowledge that either might be involved in drug trafficking.

The government offered Alesi's notes, written some time shortly after the arrest was made. These notes describe the incident in the same way Alesi spoke of it on the stand, although in more conclusory language: "observed one male white making buy from one male black at 43rd Street and Eighth Avenue, stopped male white, admitted he bought one marijuana cigarette for a dollar." <sup>3 /</sup>

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3 /

Defendant Magda's account of the events is different from that of the officer in some respects. Magda testified that the marijuana cigarette had been in his pocket from earlier in the day; that he had given change to the black man; that he did not produce the cigarette or show it to Alesi; that he stopped when Alesi grabbed him by the shoulder and asked him about a package; that after he stopped Alesi pushed him back up to 43rd Street and then searched him. During the search the officer discovered the gun and the marijuana cigarette, and according to the defendant, Alesi did not find the demand note until a later search at the police station.

Magda's sisters and his mother testified that they had each telephoned the stationhouse the night of Magda's arrest and had spoken to Alesi. Each spoke to Alesi early in the evening and at those times he mentioned to each of them searching Magda and finding the marijuana cigarette and the gun. Alesi did not say that Magda had voluntarily pulled out the cigarette. Each testified that the officer made no reference to a note on the first call. The two sisters testified that they called back later and then learned that the demand note had been found.

(Footnote continued)

Proceedings in State Court

On November 14, 1975, a suppression hearing was held in Criminal Court of the City of New York before Judge Alfred H. Kleiman. The account of the arrest that Alesi gave in that hearing was substantially the same as his testimony here. The only possibly significant differences are that in state court Alesi did not mention touching Magda's arm as the defendant walked past him, and the defendant did not testify.

After oral argument and a review of two New York State cases (People v. Rosemond, 26 N.Y. 2d 101, 257 N.E. 2d 23, 308 N.Y.S. 2d 836 (1970), and People v. Cantor, 36 N.Y. 2d 106, 324 N.E. 2d 872, 365 N.Y.S. 2d 509 (1975)), Judge Kleiman ruled from the bench that the Cantor case requires that before a patrolman can stop

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(Continued from previous page)

Alesi acknowledged receiving two or three calls from relatives of the defendant on the night of September 5, 1975. He did not remember five calls from them, and, in respect of those he remembered, he denied saying anything in a subsequent phone call at variance with the earlier one.

(end of footnote)

a person in a public place, the officer must have a reasonable suspicion not just "any suspicion, no matter what the basis of that suspicion may be" that criminal activity has happened, is happening, or is about to happen. (State Transcript at 33.) Judge Kleiman concluded that:

"To deny the motion of the Defendant in this particular case would mean the mere denomination of a particular area as a high narcotics area ... would mean that an Officer, upon the mere exchanging of hands, can stop anyone walking down 43rd Street and Eighth Avenue. I do not believe that is sufficient articulation for the basis of the right to stop a citizen."

(State Transcript at 34.)

Judge Kleiman thereupon granted the defendant's motion to suppress.

#### Discussion

Defendant contends that the officer acted improperly in stopping him as he walked down Eighth Avenue. Since I accept Alesi's version of the incident, specifically that after he questioned Magda the defendant voluntarily produced the marijuana cigarette, it follows that if the stop was valid, Magda was lawfully arrested after he had produced the cigarette. Possession of the cigarette is classified as a Class A Misdemeanor under

New York law. Penal Law §220.03. A police officer may arrest without warrant if he has probable cause to believe a crime has been committed. United States v. Watson, 44 U.S.L.W. 4112, \_\_\_\_ U.S. \_\_\_\_ (Jan. 26, 1976); Carroll v. United States, 267 U.S. 132, 156 (1925). New York specifically authorizes its law enforcement personnel to make such warrantless arrests, New York Criminal Procedure Law §140.10, and once Alesi had placed Magda under arrest, there is no question that the officer could search the defendant's person. Chimel v. California, 395 U.S. 752 (1969).

Neither the government nor the defendant suggests, however, that Alesi's first contact with the defendant constituted an arrest necessitating probable cause justification. See Henry V. United States, 361 U.S. 98 (1959).

4 /

In addition, no issue is raised that at the time Magda voluntarily produced the cigarette he was "in custody" and should have been given a Miranda warning. Miranda v. Arizona, 384 U.S. 436 (1966).

Indeed, the spectrum of authorized police street procedures may encompass some kind of inquiry that does not even rise to the level of a stop and is therefore not a "seizure" within the protection of the Fourth Amendment. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). But in this case it is clear that Alesi's first physical contact with Magda as the latter was walking along a public street at the very least constituted an investigatory stop. See Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, supra; Sibron v. New York, 392 U.S. 40 (1968).

"It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, supra, 392 U.S. at 16.

The government acknowledges this, but maintains that the stop was reasonable.

Since the stop was made by a municipal police officer purportedly acting under state and local authority, I am required, I believe, to measure the validity of the stop by state law bench marks.

*How about 2nd*  
*Footnote continued*

5 / United States v. Lovenguth, 514 F. 2d 96, 98 (9th Cir. 1975); United States v. Walling, 486 F. 2d 229, 235 (9th Cir. 1973) cert. denied 415 U.S. 923 (1974); United States v. Lepinski, (Footnote continued)

Even though New York law governs, Judge Kleiman's holding that the evidence is inadmissible does not control decision here. The prosecuting party is the federal government, not the State of New York. The United States was not a party to the state court proceeding and cannot be bound by what was decided there. 6

(Footnote continued from previous page)

460 F. 2d 234, 237 (10th Cir. 1972); but see United States v. Richards, 500 F. 2d 1025 (9th Cir. 1974) cert. denied 420 U.S. 924 (1975). See, Call v. United States, 417 F. 2d 462, 464-65 (9th Cir. 1969); United States v. Thomas, 396 F. 2d 310, 313 (2d Cir. 1968). See also, Ker v. California, 374 U.S. 23, 37 (1963); Taylor v. State of Arizona, 471 F. 2d 848, 850-51 (9th Cir. 1972) cert. denied 409 U.S. 1130 (1973); Richardson v. State of Maryland, 398 F. Supp. 425, 432 (D. Md. 1975); United States v. Rickus, 351 F. Supp. 1379, 1381 (E. D. Pa. 1972), aff'd, 480 F. 2d 919 (3d Cir.), cert. denied 414 U.S. 1006 (1973).

(end of footnote)

6 / United States v. Smith, 446 F. 2d 200, 202 (4th Cir. 1971); United States v. Feinberg, 383 F. 2d 60, 71 (2d Cir. 1967); see, Ashe v. Swenson, 397 U.S. 436, 443 (1970); United States ex rel. DiGiangiemo v. Regan, \_\_\_\_ F. 2d \_\_\_\_\_, Civil No. 75-2094 (2d Cir. Dec. 29, 1975).

Judge Kleiman's decision, however, was based on substantially the same facts as those presented here and is now part of the body of New York law that must be considered, but I am required to make an independent determination as to whether the stop is consistent with the requirements of New York law.

The Court of Appeals of New York has recently held:

"In New York the authority to intercept persons on the street is derived from two sources, the stop-and-frisk law (CPL 140.50) and the common-law power to inquire. Although the former is more narrowly circumscribed than the latter, because it entails a greater intrusion on the privacy of the individual, neither may be exercised in derogation of the State and Federal Constitutions.

"Before a person may be stopped in a public place a police officer must have reasonable suspicion that such person is committing, has committed, or is about to commit a crime (CPL 140.50). Reasonable suspicion is the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand. (Compare Schwartz, Stop and Frisk: A Case Study in Judicial Control of the Police, 58 J.Crim.L.C. & P.S. 433, 445, with La Fave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 Mich.L.Rev. 40, 70.) To justify such an intrusion, the police officer must indicate specific and articulable facts which, along with any logical deductions, reasonably prompted that intrusion. Vague or unparticularized hunches will not suffice (Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889, supra; Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 9 L.Ed. 2d 441). Nor will good faith on the part of the police be enough to validate an illegal interference with an individual (e.g., Terry v. Ohio, supra; Henry v. United States, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed. 2d 134, supra; Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed. 2d 484; Smith v. County of Nassau, 34 N.Y. 2d 18, 355 N.Y.S. 2d 349, 311 N.E. 489). People v. Cantor, supra, 36 N.Y. 2d at 112-13, 324 N.E. 2d at 877, 365 N.Y.S. 2d at 516.

In People v. Cantor, supra, the Court of Appeals ruled that an observation of the defendant and a companion smoking marijuana cigarettes "from a nearby rooftop ... through the kitchen window" (36 N.Y. 2d at 109, 324 N.E. 2d at 875; 365 N.Y.S. 2d at 513) could not be considered sufficient objective information that would amount to the specific articulable facts needed to stop someone under Criminal Procedure Law §140.50. Moreover, the observation could not give rise to a "founded suspicion that criminal activity is afoot" (36 N.Y. 2d at 114, 324 N.E. 2d at 878; 365 N.Y.S. 2d at 517) to validate a detentive stop under a policeman's common law power. On the other hand, in People v. Kreichman, 37 N.Y. 2d 693, 339 N.E. 2d 182, 376 N.Y.S. 2d 497 (1975) a policeman's observation of a person smoking a marijuana cigarette did provide reasonable cause to stop the defendant's automobile. The police car had pulled up on the passenger side of defendant's Cadillac. Both officers observed the passenger smoking what they concluded was a marijuana cigarette. Both the defendant and his passenger seemed to be looking about nervously. The Court of Appeals decided that the officers' close-up observation of the

passenger would allow a reasonable belief that he held  
7/  
a marijuana cigarette in his hand.

The stop of Magda, however, was not based on a reasonable or founded suspicion as that term has been developed in New York's decisional law. Alesi was relatively inexperienced in the field of narcotics street transactions. His eleven years on the force had been spent first as a foot patrolman in Brooklyn for three years, followed by almost eight years as a motorcycle policeman. In his six months on patrol in midtown, Alesi had made no street arrest for narcotics in that area although he had observed two such arrests. Special expertise might have allowed the officer more reasonably to suspect criminal activity from what could have been an innocent or, at best, ambiguous scene that he observed, see United States v. Salter, 521 F. 2d 1326, 1328 (2d Cir. 1975), but there is nothing in this record to warrant holding that Alesi possessed any such extraordinary skill.

7/  
For other recent cases in which reasonable suspicion or founded suspicion has been found lacking, see People v. Bergers, App. Div. 2d, 377 N.Y.S. 2d 67 (1975); People v. Towers, App. Div. 2d, 373 N.Y.S. 2d 593 (1975); People v. Grant, N.Y.L.J., Vol. 175, No. 94, Nov. 14, 1975 at p.11, col.2 (Supreme Court, Kings County).

He had seen neither Magda nor the unknown black man before, and had no information from a reliable informer that would support a suspicion that either man was involved in drug sales or other criminal activity. When Alesi first saw the defendant and the black man they were in the process of exchanging something. He had not observed them when they first met at that location. For all he knew they could have been previously acquainted. At the time he observed them the two men could have been terminating a long conversation with an exchange of addresses; they could merely have bumped into each other accidentally in taking leave of one another. There are a vast variety of situations and circumstances that could explain as being innocent and innocuous the apparent exchange the officer observed. Alesi did not describe the exchange as furtive or say that either party made an attempt to conceal the substance that was changing hands. He testified that the black man had looked up in his direction, and then turned in a rapid motion and walked away. It is difficult to view these actions as furtive and therefore capable of supporting a reasonable suspicion. Alesi never suggested that the black man ran or even walked quickly as he proceeded west on 43rd Street. In addition, the defendant turned towards the officer and walked past him--hardly suggestive of criminal involvement. This exchange is

susceptible of too many varied interpretations to justify Alesi's suspicion that criminal activity had occurred.

The reason for the stop was primarily because of an observed exchange, albeit unknown, between a young black man and a young white man in an area of the city defined as "narcotics prone." <sup>8 /</sup> There is nothing in the record to show that it is more likely than not that narcotics dealing can be reasonably expected to generate this kind of encounter between a young white and a young black person than between two men of the same race, between two women, or between any two human beings of any different ethnic origin or class. Since apparently Alesi's sole justification for stopping the defendant and interrogating him was based on Magda having had some contact with a young black man, the specific articulable facts necessary to justify police interference with an individual on the public streets were lacking. More substantial information connecting a

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<sup>8 /</sup> In a proper case area reputation may be a factor to weigh to determine the reasonableness of a policeman's suspicions. Such a generalized notion must be used with care, see generally, United States v. Gonzalez, 362 F. Supp. 415, 421-22 (S.D.N.Y. 1973); People v. Brown, 24 N.Y. 2d 421, 248 N.E. 2d 867, 301 N.Y.S. 2d 18, (1969), and cannot be the lynch pin supporting an otherwise extremely frail hunch.

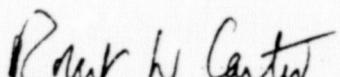
person with criminal activity is needed under New York law. A brief stop for questioning is surely not the greatest indignity a person can suffer, see United States v. Riggs, 474 F. 2d 699, 703 (2d Cir.) cert. denied 414 U.S. 820 (1973); but it is a seizure of the person and should not be initiated by a law enforcement officer because of a vague hunch or notion, unsupported by articulable facts, that criminal activity is happening, has happened or is about to happen.

It may be noted parenthetically at least that were I to apply federal standards I would reach the same result. The standards voiced by the New York Court of Appeals in People v. Cantor, supra, are not inconsistent with federal cases interpreting the constraints imposed by the Fourth and Fourteenth Amendments on police action. In Terry v. Ohio, supra, 392 U.S. at 21, the Supreme Court held that "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Footnote omitted.) In that case the "stop" and the "frisk" occurred together since the officer took hold of the suspect and immediately patted down his clothes. (392 U.S. at 21.) This case, unlike Terry involves only a stop and no frisk. A

greater quantum of information is needed to justify a frisk--a limited search for weapons--than for a stop alone. Nevertheless, the guidance of the Supreme Court is now clear. and is essentially the same as that of the New York Court of Appeals, that a mere hunch supported by no real basis in fact cannot support an investigative stop. United States v. Brignoni-Ponce, 422 U.S. 873, 880-81 (1975); Adams v. Williams, supra; Sibron v. New York, supra. Recent cases of this circuit are not to the contrary. United States v. Salter, supra; United States v. Santana, 485 F. 2d 365 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974).

Accordingly, the motion to suppress is granted, and it is so ordered.

Dated: New York, New York  
March 9, 1976



ROBERT L. CARTER  
U.S.D.J.

JGE:sk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

NOTICE OF MOTION

-v-

75 Cr. 942 (RLC)

VINCENT ANTHONY MAGDA,

Defendant.

S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit of Jeremy G. Epstein, Assistant United States Attorney, upon the accompanying memorandum of law, and upon all prior proceedings had herein, the United States of America will move this Court, at a time and place to be fixed hereafter, (1) for an order permitting reargument of the defendant Magda's motion to suppress and (2) for an order modifying this Court's decision of March 9, 1976 and thereby limiting the scope of the evidence suppressed.

Dated: New York, New York  
March 16, 1976

Yours, etc.

ROBERT B. FISKE, Jr.  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America

By:

JEREMY G. EPSTEIN  
Assistant United States Attorney  
Office and Post Office Address:  
United States Courthouse Annex  
One St. Andrew's Plaza  
New York, New York 10007  
Tel. No. (212) 791-0096

TO:  
JOHN P. CURLEY, ESQ.  
Legal Aid Society  
15 Park Row  
New York, New York 10038

JGE:sk UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

-v-

AFFIDAVIT

VINCENT ANTHONY MAGDA, :

75 Cr. 942 (ELC)

Defendant. :

-----x  
STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK)

JEREMY G. EPSTEIN, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney in  
the office of Robert B. Fiske, Jr., United States Attorney  
for the Southern District of New York, and as such I am in  
charge of the above-captioned action. I make this affidavit  
in support of the Government's motion for reargument of this  
Court's decision of March 9, 1976, granting the defendant's  
motion to suppress all evidence deriving from the search of  
his person on September 5, 1975.

2. The Government's motion for reargument is a  
limited one. We do not, at this juncture, seek reconsideration  
either of this Court's factual findings or of its conclusion  
that Officer Alesi had no reasonable basis for stopping  
Magda. Nor do we quarrel with the Court's conclusion that  
the demand note and gun found by Officer Alesi, as well as  
Magda's post arrest confession must be suppressed. We seek  
reargument only of that portion of the decision suppressing  
the evidence which derives from the discovery of the note.

3. In its first memorandum submitted in  
opposition to the defendant's motion to suppress, the  
Government conceded (at pp. 1-2) that all of its evidence

JGE:sk

available against Magda was the "fruit" of Officer Alesi's arrest on September 5, 1975. We are now compelled to reconsider that concession in the light of an intervening decision of the Court of Appeals, United States v. Kara-Thanas, F.2d \_\_\_\_\_ (2d Cir., Feb. 2, 1976).

Kara-Thanas raises substantial questions about the "fruit of the poisonous tree" doctrine that deserve to be considered in this case.

4. In this affidavit we propose to set forth more fully than has been heretofore disclosed the chain of events leading to the identification of Magda as the perpetrator of the robbery charged in the instant indictment.

5. On August 22, 1975, the United Mutual Savings Bank, 20 Union Square, New York, New York was robbed by one man. During the course of the robbery he had handed to the teller a demand note and a deposit slip. The note read as follows: "THIS IS A ROBBERY. THERE IS TWO OF US - SO NO TRICKS. I MEAN THAT. PUT ALL OF YOUR \$50 + \$100 IN THE ENVELOPE AND HAND IT BACK."

6. On or about August 27, 1975, this demand note was sent to the F.B.I. laboratory in Washington, D.C. It was compared with other items in what is termed the "Bank Robbery Note File", and an examiner concluded that the writer of that note had written notes used in six other bank robberies, in Miami (3), New Orleans, Washington, and Chicago. A copy of the laboratory report setting forth this conclusion is appended hereto as Exhibit 1.

7. On September 5, 1975, shortly after his arrest by Police Officer Saverio Alesi, Magda was interviewed at the Midtown South Precinct by Special Agent Phillips F. Mitchell, Jr. of the F.B.I. Mr. Mitchell was, quite coincidentally, the agent who had initially investigated the August 22 robbery of the United Mutual Savings Bank. In the course of that investigation he had interviewed the witnesses to the robbery at the bank and had collected the evidence, including the demand note. Mitchell immediately noticed the similarity between the note taken from Magda by Officer Alesi and that used in the United Mutual robbery. He proceeded to question Magda about that robbery and Magda admitted that he had committed it. During this interview Magda also asked about the extent of the injuries to the bank guard whom he had assaulted, and acknowledged that he had only obtained \$100 from the robbery.

8. After Magda's arrest, his fingerprints were sent to the F.B.I. laboratory in Washington. The examiner concluded that the latent right thumbprint on the deposit slip left in the United Mutual Savings Bank on August 22 was Magda's.

9. The instant indictment was filed on September 25, 1975. The Government's case against Magda rests on four factors: (1) the similarity between the demand note he possessed on September 5, 1975 and that used in the robbery; (2) his oral confession to Agent Mitchell; (3) the identification of his thumbprint on the deposit slip left in the bank; (4) the likelihood of his being identified

JGE:sk by Raffaella Casaburri, the victim teller.\*

10. As a consequence of the arrest on September 5, 1975 and Agent Mitchell's recognition of the demand note, Magda became a suspect in all of the bank robberies enumerated in Exhibit 1 attached hereto. He has to date been the subject of three other indictments: (1) on November 13, 1975, an indictment was filed in the Northern District of Illinois charging Magda with the robbery of the Amalgamated Trust and Savings Bank on June 18, 1974; (2) on December 18, 1975, an indictment was filed in the Eastern District of Louisiana charging Magda with the armed robbery of the First National Bank of Commerce on January 2, 1974; (3) on February 26, 1976, an indictment was filed in the Southern District of Florida charging Magda with two armed robberies, of the Pan American Bank of Dade County, on November 9, 1973, and of the Florida National Bank and Trust Company, on November 13, 1973.

11. Prior to Magda's arrest on September 5, 1975, he was not, to my knowledge, a suspect in any of the above-mentioned robberies; he only became a suspect once the demand

\* Although Miss Casaburri has never been shown a photospread or lineup, the Government has little doubt that she can identify Magda. When interviewed on the day of the robbery she described the robber as a white male, in his twenties, 5'6" tall, weighing 140 to 150 pounds with light brown hair. Although this is, in itself, an extremely accurate description of Magda, the description which Miss Casaburri gave to your deponent during a pretrial interview was even more precise. She stated that the bank robber appeared to have a glass eye, which Magda does in fact have. We are thus confident that Miss Casaburri could identify Magda at a trial.

JGE:sk      note was found on his person by Officer Alesi. Once that link was established, the F.B.I. was able to find other evidence to buttress its cases. The evidence in the instant indictment has already been set forth. Although I am not closely acquainted with the evidence available in the other prosecutions, I have been informed that Magda's fingerprints appear on demand notes left in the two Miami and the one New Orleans robbery for which he has been indicted. I am also aware that during the Chicago robbery for which he was indicted, surveillance photographs were taken.

12. The following information regarding the F.B.I.'s practices in identifying unknown latent fingerprints may be relevant to the Court's determination. I have been advised by several F.B.I. agents that unknown latent fingerprints, such as those left on the deposit slip in the instant case, can, in normal circumstances, only be identified when they are compared with a set of known fingerprints. Except in extraordinary cases, of which this was not one, an unknown latent fingerprint is not checked against the millions of fingerprints on file with the F.B.I. in Washington until an identification is made. To use the instant case as an example, Magda would not have been identified as a suspect in this case simply because his fingerprints were on file with the F.B.I.\* and a latent thumbprint of his appeared

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\*Magda had been arrested on three occasions prior to September 5, 1975, and the F.B.I. therefore possessed at least three sets of his fingerprints.

JGE:sk

on a deposit slip. Mag fingerprints were identified only because the similarity in the demand note he carried and the demand note used in the robbery caused the New York F.B.I. office to request that the F.B.I. laboratory check his fingerprints against the thumbprint found on the deposit slip.

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JEREMY G. EPSTEIN  
Assistant United States Attorney

Sworn to before me this  
day of March, 1976

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REPORT  
of the

A 173



FEDERAL BUREAU OF INVESTIGATION  
WASHINGTON, D. C. 20535

To: SAC, New York (91-16585)

September 16, 1975

FBI FILE NO. 91-57847

LAB. NO. D-750828040 HS

Re: UNSUB;  
UNITED MUTUAL SAVINGS BANK  
20 UNION SQUARE  
NEW YORK, NEW YORK  
8/22/75;  
ER

Specimens received 8/27/75

Q1 Piece of paper bearing hand printed demand note  
beginning "THIS IS A ROBBERY..."

ALSO SUBMITTED: United Mutual Savings Bank, New York, N.Y.  
deposit slip bearing scribbled writing

Result of examination:

As the result of a search through the Bank  
Robbery Note File it was concluded that the instant note  
was prepared by the same person or persons who prepared  
the demand notes received in the following captioned  
cases:

"Unsub; The Bank of Miami,  
110 East Flagler Street, Miami, Florida,  
10/5/73;  
ER

"Unsub; Pan American Bank of Dade County,  
1323 N. E. 163rd Street, Miami, Florida,  
11/9/73;  
ER

"Unsub; First National Bank of Commerce, Main Office,  
310 Caronne Street, New Orleans, Louisiana,  
1/2/74;  
ER

(over)

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ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED  
DATE 10-12-2014 BY SP/SP

"Unsub(1); McLachlen National Bank  
11th and G Streets, N. W., Washington, D.C.  
3/18/74;  
BR

"UNSUB;  
AMALGAMATED TRUST AND SAVINGS BANK  
100 SOUTH STATE STREET  
CHICAGO, ILLINOIS  
6/18/74;  
BR

Florida National Bank and Trust  
Company of Miami  
169 East Flager Street  
Miami, Florida  
11/13/73;  
BR

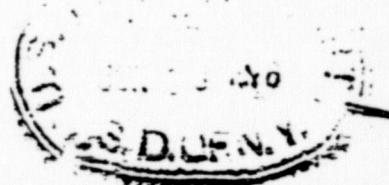
Specimen Q1 and the material designated  
ALSO SUBMITTED will be returned to the New York Office  
separately. Appropriate copies of Q1 have been made.

Page 2  
D-750626040 HS

Mr Epstein 175

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

*Copy*



UNITED STATES OF AMERICA,

- against -

75 Cr. 342

VINCENT ANTHONY MUSICA,

Defendant.

*q454/5*

A P P E A R A N C E S:

Hon. Robert B. Fiske, Jr.  
United States Attorney for the  
Southern District of New York  
One St. Andrew's Plaza  
New York, New York 10007  
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Assistant United States Attorney

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The Legal Aid Society  
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John P. Curley, Esq.  
Of Counsel  
Attorney for Defendant

CARTER, District Judge

## OPINION

Reference is made to my prior opinion in this case dated March 9, 1976, in which defendant's arrest was held to be unlawful requiring suppression of a "demand note, statements made by [the defendant] after his arrest, and any other fruits of the search in which the note was found." Id. at p.2. The government conceded in the prior proceedings that if defendant's initial encounter with the police had been marked by illegality, then all of the evidence subsequently acquired linking defendant to the instant crime was tainted by illegality as well.

The government now seeks to withdraw this concession and moves to reargue the issue of the scope of the suppression based on the recent case, United States v. Karathanos, 531 F. 2d 26 , Civil No. 75-1322 (2d Cir., Feb. 2, 1976). It is contended that Karathanos limits the reach of the application of the fruit of the poisonous tree doctrine. <sup>1/</sup> "A concession by the Government on a question of law is not binding on the court."

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<sup>1/</sup> See generally, Wong Sun v. United States, 371 U.S. 471 (1963).

United States v. Tortorello, \_\_\_ F. 2d. \_\_\_, Civil No. 75-1376 (2d Cir., April 1, 1976) at p.2833 (citations omitted). Accordingly, the motion to reargue is granted.

The government still concludes that if the search of defendant Magda in this case violated his rights, then a gun also taken from the defendant, the note, and the confession are so closely linked with the illegality as to be unquestionably tainted, and therefore inadmissible at trial. The government maintains, however, that two other items are not tainted by any illegality in the original search. First, it is argued that the identification of a thumbprint on a deposit slip which the bank robber handed, along with the demand note, to the teller of the United Mutual Savings Bank, at the time of the robbery, should be admissible at trial. According to F.B.I. laboratory analysis, the latent thumbprint matches Magda's print. Next, the government argues, identification of the defendant by the bank teller, Raffaella Casaburri is free of taint and also should be admissible at trial.

The government concedes that a single latent print, such as the one on the deposit slip, would not, except in unusual circumstances not present here, be processed through the F.B.I. files to be matched with any of the millions of F.B.I. prints on record.  
2 /  
The latent print could only be conveniently matched with a set of known prints, such as those taken from Magda at the time of his arrest in this case. The government states: "Magda would not have been identified as a suspect in this case simply because his fingerprints were on file with the F.B.I. and a latent thumbprint of his appeared on a deposit slip." Government Affidavit of March 16, 1976, at pp. 5-6 (footnote omitted) (emphasis in original).

In this explanation of F.B.I. fingerprint identification techniques the government has made clear that the identification of Magda's thumbprint on the deposit slip is a "fruit of the poisonous tree" and must be suppressed. The government was in possession

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2 / Magda had previously been arrested three times so three sets of his fingerprints would be on file with the F.B.I.

of the latent thumbprint before Magda was fortuitously discovered. It made no effort to identify him through this print and states that it did not intend to do so. There is, therefore, a direct connection between the identification of Magda's print on the deposit slip and the fingerprinting of the defendant after he was improperly taken into custody. There is no way to limit the application of the fruit of the poisonous tree doctrine to this evidence. See Davis v. Mississippi, 394 U.S. 721 (1969). The government acknowledges that there was no independent source for the fingerprints used to link Magda to this robbery. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Nor does the government contend that it would have inevitably identified Magda through its simultaneous possession of the latent thumbprint and a complete set of his prints. United States v. Paroutian, 299 F. 2d 486, 489 (2d Cir. 1962). The Second Circuit has recently reaffirmed that in a case where the path leading from improper government activity to evidence of a crime "may be long, but it is straight," <sup>3 /</sup> the evidence is tainted and must be suppressed.

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3 /  
United States v. Karanthanos, supra, 531 F. 2d at 35, quoting United States v. Tane, 329 F. 2d 848, 853 (2d Cir. 1964).

I draw a different conclusion, however, with respect to the testimony of the witness, Casaburri. The government asserts that Casaburri has given an extremely detailed and accurate description of the defendant. She has described him to be a white male in his twenties, 5'6", weighing 140 to 150 pounds, with light brown hair. She further related that the bank robber appeared to have a glass eye. The government contends that because of the exactness of this description the witness Casaburri, who has not been shown a line-up or photospread, would be able to identify Magda as the bank robber.

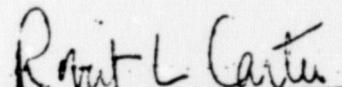
This identification testimony has no relation to the activities of the arresting officer and is not tainted. Casaburri was not located by exploiting illegal means. United States v. Karanthanos, supra. She apparently saw the robber and has described him in detail to government authorities. If she is able to identify Magda under circumstances that do not direct her choice to the defendant, then there is no basis for suppressing her testimony. See United States v. Young, 512 F. 2d 321, 323 (4th Cir. 1975). For the government to be able to offer this identification testimony, it must present

the defendant to the witness in an unsuggestive manner and with counsel present. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 383 U.S. 263 (1967). If the government wants to have a lineup as the means of identification, there should be at least six other people, including some who bear some resemblance to the defendant. See United States v. Wade, supra, 388 U.S. at 236 n.26, quoting Murray, The Criminal Lineup at Home and Abroad, Utah L.Rev. 619, 627-28 (1966). If the government seeks instead to have the identification accomplished in court, a similar procedure must be used.

In sum, the government's motion to limit the scope of the evidence suppressed is denied as to the fingerprint identification, and granted as to any identification testimony of witness Casaburri.

SO ORDERED.

Dated: New York, New York  
June 7, 1976



ROBERT L. CARTER  
U.S.D.J.

JGE:sk      UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA,

: NOTICE OF APPEAL

-v-

: 75 Cr. 942 (RLC)

VINCENT ANTHONY MAGDA,

Defendant.

-----X  
S I R S:

PLEASE TAKE NOTICE that the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the District Court filed March 9, 1976, granting the defendant's motion for suppression of evidence and the order filed June 8, 1976 denying the Government's motion for modification of the order of March 9, 1976.

Dated: New York, New York

June 18, 1976

Yours, etc.

ROBERT B. FISKE, Jr.  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America

By:

-----  
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Tel. (212) 791-0036

TO: JOHN P. CURLEY, ESQ.  
Legal Aid Society  
15 Park Row  
New York, New York 10038

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York )  
County of New York )

*Jeremy G. Epstein* being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District of  
New York.

*(two)* That on the 9 day of *August 1976*  
he served a copy of the within *Appellants Appendix*  
by placing the same in a properly postpaid franked  
envelope addressed:

*Legal Aid Society  
Room 509  
United States Courthouse*

*Foley Square  
New York, NY 10007*

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

*Annex*

*Jeremy G. Epstein*

Sworn to before me this

*8th day of August 1976*  
*Janette Ann Grayeb*

JEANETTE ANN GRAYEB  
Notary Public, State of New York  
No. 24-1541575  
Qualified in Kings County  
Commission Expires March 30, 1977